



JURISPRUDENCE  
AND  
LEGAL THEORY





# **JURISPRUDENCE AND LEGAL THEORY**

**Dr. V. D. MAHAJAN**

M.A (Hons ), LL B., Ph. D

Advocate, Supreme Court of India

सावर पैट:-  
त्रिलोक चन्द . जैन  
गोकुल 78 1 दुर्गापुर, जयपुर



**EASTERN BOOK COMPANY**

LAW PUBLISHERS & BOOKSELLERS

34, LALBAGH, LUCKNOW-226 005

Eastern Book Co (Sales)  
Kashmere Gate,  
Delhi-110 006  
Phones : 2917616, 2921656

Manav Law House  
2-A, Strachey Road,  
Civil Lines, Allahabad  
Phone : 603369

Fifth Edition, 1987  
Reprinted 1993

Price Rs. 75 00

Copyright © Eastern Book Company, Lucknow

Publishers . Eastern Book Company, 34, Lalbagh, Lucknow-226 001

Printers : Law Times Press, 56-C, Singar Nagar, Lucknow-226 005

## FOREWORD

I am happy to be able to introduce this book to the reader.

We have few practising lawyers in our country who interest themselves in an academic study of law and legal principles. Those who do write on legal subjects produce commentaries on our Acts or epitomise of our uncodified law. It is therefore refreshing to find the author dealing with a subject like jurisprudence which deals with fundamental principles underlying all law.

The study of jurisprudence by our law students has evoked a great deal of controversy. There are some who take the view that the study of a subject so abstract can be usefully prescribed only as a part of the advanced courses of legal studies. Others take the view that an intelligent approach to the study of all law, whether statute law or uncodified law, is possible only if it is preceded by a knowledge of what law is, how it arose and the basic principles which underlie most systems of law. Whichever be the correct view it is obvious that a writer who attempts to collate and explain the fundamentals which underlie legal systems generally renders a useful service to legal learning.

The treatise of the author of which I have seen the first print seems to me to be a comprehensive collection of the views of distinguished jurists on basic legal principles arranged under appropriate heads. A useful feature of the publication is the invitation to the reader who feels interested in any particular head of juris-

prudence to enter upon its research and study on his own by delving into standard works on the subject which are enumerated at the end of each chapter under the head 'Suggested Readings'.

I trust the book will be useful not only to students in legal institutions, but that it will reach the wider circle of academic and practising lawyers and others interested in law.

M. C. SETALVAD,  
Attorney-General of India.

20-11-1962

## PREFACE TO THE FIFTH EDITION

I repeat what I wrote in the Preface to the first edition of this book that the study of law must be given the due place it rightly deserves in free India. The study should be patronised in every way and every facility should be given to all those who can and are eager to pursue advanced study of any branch of law. While the State should come forward with more funds for the advancement of the study of law, it is the duty of the Hon'ble Judges of the Supreme Court of India and the various High Courts to make their respective contributions to the study of law. The learned members of the Bar in India should also take pride in advancing the cause of the study of law by their invaluable experience. They must not be selfish and keep their knowledge of law to themselves. They should be happy to share the same with others. Every great lawyer must write on the subject in which he has specialised. The teachers of law also must not lag behind. Everyone should devote himself wholeheartedly to the study of law and must make some contribution to some aspect of law. If we all pull together, the study of law is bound to make progress.

The object of this book is not only to explain the principles of Jurisprudence but also of Legal Theory. A detailed study of the same has been attempted in this edition. I have drawn largely on the works of Salmond, Prof. R. W. M. Dias, Lord Lloyd, Allen, Hall, Hart, Roscoe Pound, Paton and others and I am greatly indebted to all of them. At the end of

every chapter, I have given Suggested Readings which will be found useful.

It gives me great pleasure to say that the present edition is a great improvement on the previous editions of this book. A comparison will show that most of the book has been rewritten. Chapters XXI to XXIX dealing Analytical Legal Positivism, Pure Theory of Law, Historical School of Law, Philosophical School of Law, Sociological School, American Realism, The Scandinavian Realists and Natural Law are new additions. Chapters on Nature and Scope of Jurisprudence, The Nature of Law, Kinds of Law, Law and Morals, Administration of Justice, Legislation, Precedent, Custom, Legal Rights and Duties, Ownership and Possession, Persons and Liability have been rewritten. There is hardly any chapter which has not been rewritten. All this has added to the utility of the book. This edition embodies the latest researches in the field of law in various parts of the world.

It is hoped that the new edition will be welcomed by all those for whom it is meant.

Feb. 1, 1987  
D-805, New Friends Colony,  
New Delhi.

V.D. MAHAJAN

# CONTENTS

<i>Chapters</i>	<i>Pages</i>
1. Nature and Scope of Jurisprudence	.. 1
<div style="margin-left: 20px;"> <del>Q<sup>1</sup></del> What is Jurisprudence (1-11)—Austin (2-5)—Holland (5-8)—Salmond (8-9)—Keeton (9-10)—Pound (10-11)                 </div> <div style="margin-left: 20px;"> <del>Q<sup>1</sup></del> Scope of Jurisprudence (11-12)—Approach to study of Jurisprudence (12)—Significance and utility of Jurisprudence (12-15)—Relation of Jurisprudence with other social sciences (15-16)—Jurisprudence and Sociology (16-18)—Jurisprudence and psychology (18)—Jurisprudence and Ethics (18-20)—Jurisprudence and Economics (20)—Jurisprudence and History (20)—Jurisprudence and Politics (21)—Synthetic jurisprudence (21-23).                 </div>	
2. The Nature of Law	.. 26
<div style="margin-left: 20px;">                     Definition of law (26-31)—<sup>Q<sup>2</sup></sup> Austin's theory of law (31-33)—Criticism of Austin's theory of law (33-41)—Salmond's definition of law (41-45)—Legal sanctions (45-47)—Territorial nature of law (47-50)—Purpose and function of law (50-53)—Uses or advantages of law (53-55)—Disadvantages of law (55)—Questions of law and fact (56-58)—Questions of law (56-57)—Questions of fact (57-58)—Questions of fact and discretion (58-59)—Mixed questions of law and fact (59)—Transformation of questions of fact into law (59)—Discordance between law and fact (59-60)—Legal presumptions (60-61)—Legal fiction (61-63).                 </div>	
3. Kinds of Law	.. 64
<div style="margin-left: 20px;">                     Imperative law (64-65)—Physical or scientific laws (65-66)—Natural law or moral law (66-69)—Conventional law (69-70)—Customary law (70-71)—Practical or technical law (71)—International law (71-76)—Civil law (76-77)—Common law (77-79)—Equity (79-80)—                 </div>	



<i>Chapters</i>	<i>Pages</i>
Constitutional law (80-85)—Administrative law (85-86)—General law and special law (87-88)—Kinds of Special laws (88-92)—Local law (88)—Foreign law (88-89)—Conventional law (89)—Autonomic law (89-90)—Martial law (90-91)—International law as administered by Prize Courts (Prize Law) (91-92)—Mercantile customs (92)	
4. Classification of Laws .. .. .	94
International law and municipal law (94-95)—Municipal law (95-96)—Public law (95)—Constitutional law (95)—Administrative law (95)—Criminal law (95-96)—Private law (96).	
5. Law and Morals .. .. .	97
Distinction between law and morals (98-103)—Relationship between law and morals (103-06)—Morals as part of law (106-07)—Legal enforcement of morals (107)—Influence of morals on law (107-08)	
6. State and Sovereignty .. .. .	109
Definition of State (109-10)—Essential elements of the State (110-11)—Functions of the State (112-13)—Primary functions of the State (112-13)—Secondary functions of the State (113)—Unitary and composite States (113-14)—The State and law (114-15)—Sovereignty (115-27)—Salmond on sovereignty (116-17)—Dicey on sovereignty (117)—Jethrow Brown on sovereignty (117-18)—Kelsen on sovereignty (118)—Duguit on sovereignty (118)—Pluralists on sovereignty (118)—Marxist view of sovereignty (118-19)—Austin's theory of sovereignty (119-27).	
7. Administration of Justice .. .. .	128
Importance of justice (128)—Administration of justice (128-29)—Necessity of administration of justice (129-30)—Origin and growth of administration of	

*Chapters**Pages*

justice (130-31)—Advantages and disadvantages of legal justice (131-32)—Public justice (132-33)—Justice according to law (133)—Civil and Criminal justice (133-36)—Theories of punishment (136-48)—Deterrent theory of punishment (136-38)—Preventive theory of punishment (138)—Relation between deterrent and preventive theories (138-39)—Reformative theory (139-42)—Relation between deterrent and reformatory theories (143-45)—Retributive theory (145-47)—Theory of compensation (147-48)—Kinds of punishment (148-63)—Capital punishment (148-60)—Deportation (161)—Corporal punishment (161-62)—Imprisonment (162)—Solitary confinement (162-63)—Indeterminate sentence (163)—Civil justice (163-66)—Primary and Secondary rights (163-64)—Penal and remedial proceedings (164)—Secondary functions of courts of law (165-66).

## 8. Sources of Law .. .. 169

Meaning of sources of law (169-70)—Austin's view (170-71)—Sociological view (171)—View of Salmond (171)—Material sources of law (171-74)—Legal and historical sources of law (171-74)—Legal sources of English law (175-76)—Sources of law and sources of rights (176)—Ultimate legal principles (176-77).

## 9. Legislation .. .. 178

Meaning of legislation (178)—Legislation as source of law (178-79)—Supreme and subordinate legislation (179-83)—Subordinate legislation (180-81)—Delegated legislation (181-83)—Methods of control of delegated legislation (182-83)—Legislation and precedents (183-84)—Legislation and custom (184-85)—Advantages of legislation over precedent (185-87)—Advantages of precedent over legislation (187-88)—Codification (188-95)—Kinds of codification (190)—Merits of codification (190-92)—Demerits of codifica-

# Chapters

# Pages

tion (192-95)—Rules of interpretation of legislation (195-205)—Grammatical interpretation (195-97)—Golden rule of interpretation (197-98)—The Mischief rule (198-99)—Logical interpretation (199-201)—Strict and equitable interpretation (201)—Restrictive and extensive interpretation (201-02)—Historical interpretation (202-03)—Sociological interpretation (203-04)—Equity of a statute (204)—Rule of Casus Omissus (204-05)—Rules of interpretation of statutes (205-14).

## 10. Precedent .. .. . 215

Precedent as source of law (215-17)—Nature of precedent (217)—Authority of precedent (217-19)—Circumstances which destroy or weaken the binding force of precedent (219-24)—Abrogated decisions (219-20)—Affirmative or reversal on a different ground (220-21)—Ignorance of statute (221)—Inconsistency with earlier decisions of higher courts (221)—Inconsistency between earlier decisions of the courts of the same rank (221)—Precedents *sub silentio* or not fully argued (222)—Decisions of equally divided courts (222-23)—Erroneous decisions (223-24)—Circumstances which increase the authority of a precedent (224)—Do judges make laws? (224-32)—Judges as law-makers (227-30)—Methods of judicial decisions (232)—Defects in judicial legislation (232-33)—Kinds of precedents (233-38)—Authoritative and persuasive precedents (233-34)—Absolute and conditional precedents (234-37)—Declaratory and original precedents (238)—*Stare Decisis* (238-41)—Decisions reached *per incuriam* (241-42)—Decisions *sub silentio* (242-43)—Doctrine of Prospective overruling (243)—Ratio Decidendi (244-45)—*Obiter Dictum* (245-47)—Decision on authority and decision on principle (247)—Disregard of precedent (247-48)—Precedent and legal development (248-50)—Sources of judicial principles (250)—Functions of judges and jury (250-52).

Chapters	Pages
11. Custom .. ..	254

Definition of custom (254-55)—Origin of custom (255-57)—<sup>257</sup>Binding force of custom (257-59)—Theories regarding transformation of customs into law (259-64)—Kinds of custom (264-69)—Legal custom (264)—Conventional custom or usage (264-66)—The Law Merchant (266-67)—Local custom (267-68)—General custom (268-69)—Requisites of a valid custom—<sup>269</sup>269-72)—Custom must be immemorial (269-70)—Custom must be reasonable (270-71)—Custom must be continuously observed (271)—Custom and prescription (272-73)—Present position of customary law (273-74).

12. Professional Opinions and Religion ..	275
---	-----

Professional opinions (275-80)—Religion as source of law (280)—Agreement as source of law (280-81).

✓ 13. Legal Rights and Duties <sup>282</sup>	282
--	-----

Legal wrong (282-83)—Duty (283-85)—Definition of legal rights (285-89)—Theories about Legal Rights (289-91)—Will theory of rights (289-90)—Interest theory of rights (290)—Essentials of a legal right (291—<sup>293</sup>93)—Parties to a legal right (293)—Enforcement of legal rights (293-94)—Extinction of rights (294)—Relation between right and legal liberty (294-95)—Right and power (295-96)—Powers and Immunity (296)—Relation between rights and duties (296-99)—Ownerless rights (299-300)—Classification of rights according to their objects (300-02)—Legal rights in a wider sense (302-04)—Kinds of legal burdens (304-05)—Rights and duties of the State (305-06)—Rights against State (306-07)—Estate and Status (307-08)—Rights of beneficiary (308-09)—Kinds of civil rights (309-10)—Kinds of legal rights (310-22)—Perfect and Imperfect Rights (310-11)—Positive and Negative Rights (311)—Real and Personal Rights (311-12)—Rights in rem and rights in

Chapters	Pages
<p><i>personam</i> (312-14)—<i>Right in Rem</i> (313-14)—<i>Right in Personam</i> (314)—Proprietary and Personal rights (314-15)—Inheritable and uninheritable rights (315)—Rights <i>in re propria</i> and rights <i>in re aliena</i> (315-16)—Principal and Accessory rights (316-17)—Legal and Equitable rights (317-18)—Primary and Secondary rights (319)—Antecedent and remedial rights (319)—Public and private rights (319-20)—Vested and contingent rights (320)—Servient and dominant rights (320)—Municipal and international rights (321)—Rights at rest and rights in motion (321)—Ordinary and fundamental rights (321)—<i>Jus ad rem</i> (321-22).</p>	
14. Ownership and Possession	.. 324
<p>Development of the idea of ownership (324)—Definition of ownership (324-30)—View of Austin (325)—View of Holland (327)—View of Markby (327)—View of Hibbert (327)—View of Paton (327-28)—View of Pollock (328-29)—View of Salmond (329)—Criticism of the idea of ownership (329-30)—Essentials of ownership (330-32)—Subject-matter of ownership (332-33)—Right of ownership and ownership of a right (333)—Modes of acquiring ownership (333-34)—Different kinds of ownership (334-36)—Corporeal and incorporeal ownership (335)—Trust and beneficial ownership (335-36)—Trust and bailment (336)—Trust and executorship (336-37)—Trust and contract (337)—Trust and Agency (338)—Trust and mortgage (338-39)—Legal and Equitable ownership (339-40)—Vested and contingent ownership (340-42)—Contingent interest (342)—Distinction between vested and contingent interest (342-44)—Condition precedent and condition subsequent (344)—Distinction between condition precedent and condition subsequent (345-46)—Sole ownership and co-ownership (346-47)—Absolute and limited ownership (347-48)—Importance of possession (348-51)—Development of the concept of possession (351)—Possession in fact and possession in law (351-52)—</p>	

# Chapters

# Pages

<sup>94.</sup>  
 Elements of possession (352)—Corpus of possession (353)—Relation of possessor to other persons (353-56)—*Animus Possidendi* (357-58)—Savigny's theory of possession (358-63)—Methods of transfer of possession (363-64)—*Res Nullius* (364-65)—Kinds of possession (365-69)—Immediate and Mediate possession (365-66)—Corporeal and incorporeal possession (366-67)—Representative possession (367)—Concurrent possession (367)—Derivative possession (367-68)—Constructive possession (368)—Adverse possession (368)—Duplicate possession (368)—Why possession is protected? (369-71)—Distinction between possession and ownership (373-75).

## 15. Persons .. .. . 377

Definition of person (377-78)—Legal status of lower animals (378-80)—Legal status of dead person (380-83)—Legal status of unborn persons (382-83)—Legal status of an idol (383)—Legal status of mosque (383-84)—Kinds of persons (384)—Natural person (384)—Legal person (384-85)—Kinds of legal persons (385-90)—Corporation aggregate (386-87)—Corporation sole (387)—Corporation and firm (389)—Corporation and natural persons (389-90)—Theories of corporate personality (390-96)—Fiction theory of corporation (390-91)—Realistic theory of person (391-93)—Concession theory (393)—Bracket theory (394)—Purpose theory (394)—Nationality of corporation (397-400)—State as a corporation (400)—Uses and purposes of incorporation (401-03)—Judicial decisions (403-05).

## 16. Title .. .. . 407

Definition and nature of title (407-08)—Classification of titles (408-10)—Importance of agreements (410-11)—Kinds of agreements (411-12)—Validity of agreements (412-13)—Modes of acquiring possession (413)—Modes of acquiring ownership (413-14)—Prescription (414-15).

Chapters	Pages
17. Liability .. .. .	416
Definition and nature of liability (416)—Kinds of liability (416-25)—Civil liability (416-17)—Remedial liability (417-18)—Penal liability (418-19)—Vicarious liability (420-23)—Absolute or strict liability (423-25)—General conditions of liability (425)—Act (425-26)—Juristic acts (427)—Wrongful acts (427)— <i>Damnum sine injuria</i> (427)— <i>Injuria sine Damnum</i> (427-28)— <i>Mens Rea</i> (428-34)— <i>Mens Rea</i> when not essential (431-34)—Transferred Malice (434)—Presumption of Innocence (434-35)—Stages in the commission of a crime (435-37)—Intention, preparation, attempt and commission of crime (436-37)— <i>Jus Necessitatis</i> (437-39)—Intention (439-40)—Difference between intention and motive (440-41)—Malice (441)—Negligence (441-43)—Negligence and inadvertence (443)—Negligence and intention (443-44)—Culpable negligence (444)—Duty of care (444)—Standard of care (444-46)—Theories of negligence (446-51)—Subjective theory of negligence (447)—Objective theory of negligence (447)—Contributory negligence (450-51)—Measure of Penal liability (451-52)—Motive of offence (451)—Magnitude of the offence (451-52)—Character of the offender (452)—Measure of civil liability (452-53)—Crime and tort—a distinction (453-54)—Exemptions from criminal liability (455-56)	
18. Law of Property .. .. .	458
Meaning of property (458-59)—Kinds of property (459)—Corporeal property (459-60)—Real and personal property (460-61)—Incorporeal property (461)—Rights <i>in re propria</i> (461)—Rights <i>in re aliena</i> (462-63)—Leases (463)—Servitudes (463-64)—Kinds of servitudes (464-65)—Personal servitude (464)—Public servitude (464)—Positive servitude (464)—Securities (465)—Mortgage and Lien (465-66)—Kinds of liens (466)—Trust (466-67)—Modes of acquisition of property (467-	

<i>Chapters</i>	<i>Pages</i>
471)—Possession (467)—Prescription (467-68)— Theories of property (471-74)—Natural law theory of property (471-72)—Metaphysical theory of property (472)—Historical theory of property (472-73)—Positive theory of property (473)—Psychological theory of property (473)—Sociological theory of property (473- 74)—Property and law, relation between (474)	

## 19. Law of Obligations .. .. 475

Definition of obligation (475-76)—Chose in action (476)—Chose in possession (476)—Solidary obligations (476-77)—Three kinds of solidary obligations (477-80)—Sources of obligations (480-84)—Obligations arising from contracts or contractual obligations (480)—Obligations arising from torts or delictal obligations (481)—Distinction between contractual obligation and delictal obligation (481-82)—Obligations arising from quasi-contracts (482-83)—Innominate obligations (484).

## 20. The Law of Procedure .. .. 485

Law of procedure and substantive law (485-88)—Elements of judicial procedure (488)—Definition of evidence (488-89)—Kinds of evidence (489-91)—Judicial evidence (489-90)—Personal or real evidence (490)—Primary or secondary evidence (490)—Direct or circumstantial evidence (490-91)—Production of evidence (491-92)—Probative value of evidence (492-94)—Conclusive proof (492-93)—Presumptive proof (493)—Exclusive evidence (493).

### **Legal Theory**

## 21. Legal Theory .. .. 497

## 22. Analytical Legal Positivism .. .. 503

Different approaches (503)—Positivism in law (503-05)—Analytical school (505-40)—Bentham (507-14)—



<i>Chapters</i>	<i>Pages</i>
John Austin (514-26)—Austin and Bentham (526-27) —Neo-Austinian School (527-28)—H. L. A. Hart (528-40).	
23. Pure Theory of Law .. ..	543
Kelsen and Pure Theory of Law (543-45)—Kelsen and the Basic Norm (545-46)—Implications of Pure Theory of Law (546-50)—Criticism of Pure Theory of Law (550-54)—Contribution of Kelsen (554-55)—Kelsen and Bentham (555-56).	
24. Historical School of Law .. ..	557
Nature of Historical School of Law (557-58)—Montesquieu (558)—Herder (559)—Burke (559)—Hugo (559)—Savigny (560-71)—Criticism of Savigny (563-70)—Contribution of Savigny (570-71)—Puchta (571)—Gierke (571-72)—Sir Henry Maine (572-83)—Writings of Maine (573)—Movement from status to contract (576)—Contribution of Maine (581-82)—Influence of Maine (582-83)—Estimate of Historical School (583-84)—Comparison of Historical and Analytical Schools (584-85)—Distinction between legal history and historical jurisprudence (585-86).	
25. The Philosophical School of Law .. ..	588
Jurisprudence and ethics (588-90)—Exponents of Philosophical School (590)—Grotius (590-91)—Kant (591-93)—Fichte (593-94)—Hegel (594-96)—Influence of Kant, Fichte and Hegel (596-98)—Neo-Hegelians (598)—Kohler (599)—Stammler (599-602)—Del Vecchio (602-03).	
26. Sociological School .. ..	605
Montesquieu (606-07)—Auguste Comte (607)—Durkheim (607-08)—Herbert Spencer (608-09)—Duguit (609-16)—Gierke (616)—Hauriou (616-18)—Max Weber (618-19)—Ihering (619-25)—Ehrlich (625-32)	

<i>Chapters</i>	<i>Pages</i>
<p><i>92.</i>  <u>Roscoe Pound</u> (632-45)—Theory of Social Engineering (634-43)—Pound on Social Justice (643-44)—Pound's contribution (644-45)—Karl Renner (645-46)—Pashukanis (646)—Parsons (646)—Stone (646-47)—Evaluation of Sociological School (647-49).</p>	
27. American Realism .. ..	652
<p>Realist movement in the United States (652-54)—Gray (654)—Justice Holmes (654-56)—Jerome Frank (656-60)—Llewellyn (660-65)—Computer Prediction (665-66)—Assessment of the Realist Movement (666-70).</p>	
28. The Scandinavian Realists .. ..	672
<p>Hagerstrom (672-74)—Empirical basis of rights (673)—Historical basis of rights (673)—Objective values (673-74)—Olivecrona (674-77)—Binding force of law (675-76)—Rights (676)—Estimate of Olivecrona (676-77)—Alf Ross (677-81)—Valid law (678)—Norm (679-80)—The Verifiability Principle (680)—Reductionism and legal concepts (680-81)—A. V. Lundstedt (681-84)—Scandinavian and American Realism (684-85)—Criticism of the Realists in general (685-86)—Contribution of the Realists (686).</p>	
29. Natural law .. ..	688
<p>Natural law in general (688-89)—Greece (689-90)—Socrates (690)—Plato (690)—Aristotle (690-91)—Stoics (691)—Rome (691)—Gaius (692)—Cicero (692)—The Middle Ages (692)—Aquinas (692-96)—Grotius (696-97)—Pufendorf (697)—Wolff (697)—Vattel (697-98)—Natural law and social contract (698)—Grotius (699)—Hobbes (699-701)—Locke (701-03)—Rousseau (703-07)—Kant (708-09)—Fichte (709)—Decline of natural law theories (709-10)—David Hume (710)—Bentham (711)—Austin (711-12)—Natural law ideas in English law (712-13)—Natural law in American Juris-</p>	

<i>Chapters</i>	<i>Pages</i>
prudence (713-14)—Revival of Natural Law theories (714-15)—Dabin (715-16)—Stammler (716-18)—John Rawls (718-20)—Clarence Morris (720-21)—Del Vecchio (721-23)—Geny (723)—Le Fur (723)—Hall (723-24)—John Wild (724-25)—L. L. Fuller (725-26)—Castberg (726)—D'Entreves (726)—H. L. A Hart (728-30)—Natural law and the Supreme Court of India (731-32).	
Index	733

# I

## NATURE AND SCOPE OF JURISPRUDENCE

### What is Jurisprudence?

It is difficult to give a universal and uniform definition of jurisprudence. Every jurist has his own notion of the subject matter and the proper limits of jurisprudence depend upon his ideology and the nature of society. Moreover, the growth and development of law in different countries has been under different social and political conditions. The words used for law in different countries convey different meanings. The words of one language do not have synonyms in other languages conveying the same meaning. The word "jurisprudence" is not generally used in other languages in the English sense. In French, it refers to something like "case law". The evolution of society is of a dynamic nature and hence the difficulty in accepting a definition by all. New problems and new issues demand new solutions and new interpretations under changed circumstances. However, scientific inventions have brought the people of the world closer to each other which helps the universalisation of ideas and thoughts and the development of a common terminology.

The study of jurisprudence started with the Romans. (The Latin equivalent of "jurisprudence" is *jurisprudentia* which means either "knowledge of law" or "skill in law".) Ulpian defines jurisprudence as "the knowledge of things divine and human, the science of the just and unjust". Paulus, another Roman jurist, maintained that "the law is not to be deduced from the rule, but the rule from the law". The definitions given by the Roman jurists are vague and inadequate but they put forth the idea of a legal science independent of the actual institutions of a particular society.

In England, the word jurisprudence was in use throughout the early formative period of the common law, but as meaning little more than the study of or skill in law. It was not until the

time of Bentham and his disciple Austin in the early part of the 19th century that the word began to acquire a technical significance among English lawyers. Bentham distinguished between examination of the law as it is and as it ought to be ('expositorial' and 'censorial' jurisprudence). Austin occupied himself with 'expository' jurisprudence and his work consisted mainly of a formal analysis of the structure of English law. Analytical exposition of the type which Bentham pioneered and Austin developed, has dominated English legal thought up to the modern times. The word jurisprudence has come to mean in England almost exclusively an analysis of the formal structure of law and its concepts.

There has been a shift during the last one century and jurisprudence today is envisaged in an immeasurably broader and more sweeping sense than that in which Austin understood it. To quote Buckland: "The analysis of legal concepts is what jurisprudence meant for the student in the days of my youth. In fact it meant Austin. He was a religion; today he seems to be regarded rather as a disease." Julius Stone describes jurisprudence as "the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law". (*Legal System and Lawyers' Reasonings*, p 16). Lord Radcliffe writes: "You will not mistake my meaning or suppose that I deprecate one of the great humane studies if I say that we cannot learn law by learning law. If it is to be anything more than just a technique, it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and philosophy of life." (*The Law and Its Compass*, pp. 92-93).

### Austin

The view of Austin is that the science of jurisprudence is concerned with positive law, with "laws strictly so-called". It has nothing to do with the goodness or badness of law. Austin divided the subject into *general and particular jurisprudence*. General jurisprudence includes such subjects or ends of law as are common to all systems while particular jurisprudence is confined only to the study of any actual system of law or any portion of it. To quote Austin: "I mean then by general jurisprudence the science

concerned with the exposition of the principles, notions and distinctions which are common to all systems of law, understanding by system of law the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instructions." Again, "the proper subject of general or universal jurisprudence is a description of such subjects and ends of laws as are common to all systems and those resemblances between different systems which are bottomed in the common nature of men or correspond to the resembling points in the several portions". General jurisprudence is an attempt to expound the fundamental principles and broadest generalisations of two or more systems. It is the province of general, pure or abstract jurisprudence to analyse and systematise the essential elements underlying the indefinite variety of legal rules without special reference to the institution of any particular country. Particular jurisprudence is the science of particular law. It is the science of any system of positive law actually obtaining in a specifically determined political society. To quote Austin: "Particular jurisprudence is the science of any actual system of law or any portion of it. The only practical jurisprudence is particular."

General and particular jurisprudence differ from each other not in essence but in their scope. The field of general jurisprudence is a wider one. It takes its data from the systems of more than one State while particular jurisprudence takes its data from a particular system of law. Its principles are coloured and shaped by the concrete details of a particular system. However, in both cases, the subject of jurisprudence is positive law.

The relation of general and particular jurisprudence may be shown by an example. Possession is one of the fundamental legal concepts recognised by all systems of law. The function of jurisprudence is to explain its characteristics, its legal value, mode of its acquisition and extinction. General jurisprudence will analyse it without reference to any particular legal system, but particular jurisprudence will do the same thing but with reference to some particular system of law.

Austin's classification of jurisprudence into general and particular jurisprudence has been criticised by Salmond, Holland

and other jurists. The main contention in rejecting the classification of Austin is based upon its impracticability. Salmond points out that the error in Austin's idea of general jurisprudence lies in the fact that he assumes that unless a legal principle is common to many legal systems, it cannot be dealt with in general jurisprudence. There may be many schools of jurisprudence but there are not different kinds of jurisprudence. Jurisprudence is one integral social science. The distinction between general and particular jurisprudence is not proper. It is not correct to use such terms as Hindu jurisprudence, Rōman jurisprudence or English jurisprudence. Actually what we are dealing with are not different kinds of jurisprudence but different systems of law. It is more appropriate to use the term jurisprudence alone without any qualifying epithet. Jurisprudence is a social science which deals with social institutions governed by law. It studies them from the point of view of their legal significance.

Holland also has criticised the classification of Austin. Referring to the particular jurisprudence of Austin, Holland points out that it is only the material which is particular and not the science itself. The study of a particular legal system is not a science. Giving the example of the geology of England, Holland points out that: "A science is a system of generalizations which, though they may be derived from observation over a limited area, will hold good everywhere assuming the subject matter of the science to possess everywhere the same characteristics." Again, "principles of geology elaborated from the observation of England alone hold good all over the globe in so far as the same substances and forces are everywhere present and the principles of jurisprudence, if arrived at entirely from English data, would be true if applied to the particular law of any other community of human beings, assuming them to resemble in essentials to the human beings who inhabited England".

The criticism of Holland is based on the assumption that law has the same characteristics all over the world but that is opposed to human experience. Maitland points out that "races and nations do not travel by the same roads and at the same rate". Lord Bryce writes: "The law of every country is the outcome and result of the economic and social conditions of that country

as well as the expression of its intellectual capacity for dealing with these conditions." Buckland observes: "Law is not a mechanical structure like geological deposits; it is a growth and its true analogy is that of biology." Savigny says: "Law grows with the growth and strengthens with the strength of people and its standard of excellence will generally be found at any given period to be in complete harmony with the prevailing ideas of the best class of citizens." Puchta writes: "The progress in the formation of law accordingly keeps pace with the progress in the knowledge of the people of the facts which they observe and hence it is that law has its provincialisms no less marked than language."

Dias and Hughes point out serious ambiguities in Austin's definition of general jurisprudence. Austin gives no criterion for amplitude and maturity. He also does not explain whether the common principles are those which are in fact found to be common or those which for some reason are treated as being necessarily common. There is no demonstration that the notions which he put into his book are in truth shared by "ampler and natural system" whatever they may be. When we look at the substance of his book, we find that it is drawn mainly from English law with occasional superficial references to Roman law. His jurisprudence is essentially "particular", at the most comparative.

Buckland points out that Austin and others who profess "general jurisprudence" do not adhere to it in practice.

### *Holland*

Sir Thomas Erskine Holland defines jurisprudence as "*the formal science of positive law*". It is a formal or analytical science rather than a material science. The term positive law has been defined by Holland as "the general rule of external human action enforced by a sovereign political authority". Holland follows the definition of Austin but he adds the term formal, which means "that which concerns only the form and not its essence". A formal science is one which describes only the form or the external side of the subject and not its internal contents. Jurisprudence is not concerned with the actual material contents of law but with its fundamental conceptions. Holland came to



the conclusion that jurisprudence is not a material science but merely a formal science. To quote him. "The assertion that jurisprudence is a general science may perhaps be made clearer by an example. If any individual should accumulate a knowledge of every European system of law, holding each part from the rest in the chambers of his mind, his achievements would be best described as an accurate acquaintance with the legal systems of Europe. If each of these systems were entirely unlike the rest except when the laws had been transferred in the course of history from one to the other, such a distinguished jurist could do no more than endeavour to hold fast and to avoid confusing the heterogeneous information of which he had become possessed. Suppose, however, as is the case, that the laws of every country contain a common element; that they have been constructed in order to effect similar objects, and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated materials a scheme of the purposes, methods and ideas common to every system of law. Such a scheme would be a formal science of law, presenting many analogies to grammar, the science of those ideas of relation which, in greater or less perfection, and often in the most dissimilar ways, are expressed in all the languages of mankind. Just as similarities and differences in the growth of different languages are collected and arranged by comparative philology and the facts thus collected are the foundations of abstract grammar, so comparative law collects and tabulates the legal institutions of various countries and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realised in actual systems. It is, for instance, the office of comparative law to ascertain what have been at different times and places the periods of prescription or the requisites of a good marriage. It is for jurisprudence to elucidate the meaning of prescription in its relation to ownership and to actions; or to explain the legal aspects of marriage and its connection with property and the family. We are not indeed to suppose that jurisprudence is impossible unless it is preceded by comparative law. A system of jurisprudence might conceivably be constructed from the observation of one system of law only at one epoch

of its growth." Again, "jurisprudence is therefore not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognized as having legal consequences". Jurisprudence "deals rather with the various relations which are regulated by legal rules than with the rules which themselves regulate these relations"

Many eminent jurists have criticised the view of Holland that jurisprudence is a formal science of positive law. According to Gray "Jurisprudence is, in truth, no more a formal science than physiology. As bones and muscles and nerves are the subject matter of physiology, so the acts and forbearances of men and the events which happen to them are the subject matter of jurisprudence and physiology could as well dispense with the former as jurisprudence with the latter." Again, "the real relation of jurisprudence to law depends upon not what law is treated but how law is treated. A treatise on jurisprudence may go into the minutest particulars or be confined to the most general doctrines and in either case deserves its name; what is essential to it is that it should be an orderly, scientific treatise in which the subjects are duly classified and subordinated". Dr. Jenks asks: "Can jurisprudence be truly said to be a purely formal science? Not, it is submitted, unless the word 'formal' be used in a strained and artificial sense. It is true that a jurist can only recognize a law by its form, for it is the form which, as has been said, causes the manifold matter of the phenomena to be perceived. But the jurist, having got the form as it were, on the operating table, has to dissect it and ascertain its meaning. Jurisprudence is concerned with means rather than with ends, though some of its means are ends in themselves. But to say that jurisprudence is concerned only with forms is to degrade it from the rank of a science to that of a craft."

Prof. Platt also criticises the definition of Holland in these words: "Without resorting to acts and forbearances and to the state of facts under which they are commanded law cannot be differentiated at all; not so much as the bare framework of its chief departments can be erected. An attempt to construct quite apart from all the matter of law even the most general conception

of ownership or contract would be like trying to make bricks not merely without straw but without clay as well."

Holland's definition of jurisprudence appears to be a good one. There is no reasonable reason to criticise it. The criticism of Gray is not without doubt. In his view a scientific treatise on any department of the law may be described as jurisprudence. Such usage is by no means uncommon, but if we understand by jurisprudence "the science of law in general", we must admit it to be a misapplication of this ponderous quadrisyllable. Dr. Jenks seems to confuse a formal science with a "formalistic" manner of dealing with the science. If the jurist attaches undue importance to mere forms, takes positive view as the highest law and fails to penetrate to the social forces which would mould the law, his treatment of his subject would be formalistic and unworthy of a great social science. Jurisprudence, as a science, is concerned only with the form which conditions social life, with human relations that have grown up in society and to which society attaches legal significance. In this sense, jurisprudence is a formal science. Being the systematised and properly coordinated knowledge of a subject of intellectual inquiry, jurisprudence is a science. The subject of inquiry is the mutual relations of men living together in an organised society. The term "positive law" confines the inquiry to those social relations which are regulated by the rules imposed by the State and enforced by its courts. The prefix "formal" indicates that the science deals only with the purposes, methods and ideas at the basis of the legal system as distinct from a "material science" which deals with the concrete details of law.

### *Salmond*

Salmond defines jurisprudence as "the science of law". By law he means the law of the land or civil law. In that sense, jurisprudence is of three kinds. Expository or systematic jurisprudence deals with the contents of an actual legal system as existing at any time, whether in the past or in the present. Legal history is concerned with a legal system in its process of historical development. The purpose of the science of legislation is to set forth law as it ought to be. It deals with the ideal of the legal system and the purpose for which it exists.

(Salmond makes a distinction between the use of the term jurisprudence in the generic and specific sense. Generic jurisprudence includes the entire body of legal doctrines whereas specific jurisprudence deals with a particular department of those doctrines.) In the latter sense, it may be called theoretical or general jurisprudence. Salmond says that his book is concerned only with this jurisprudence which he defines as "the science of the first principles of the civil law".

Taking the word jurisprudence in its 'specific' sense, Salmond has made a division of the subject into three branches, viz., analytical, historical and ethical jurisprudence. For a comprehensive treatment of the subject, all the three branches must be studied. About his own book, Salmond says that it is "primarily and essentially a book on analytical jurisprudence. In this respect, it endeavours to follow the main current of English legal philosophy rather than that which prevails upon the continent of Europe, and which, to a large extent, is primarily ethical in its scope and method". He further adds that he has not excluded the historical and ethical aspect altogether because by their total exclusion, it is not possible to give a complete analytical picture of law.

It is submitted that although Salmond tried to demarcate the boundary of the subject very clearly, he failed to give an accurate and scientific definition. On the basis of his definition, the same word may be used to mean things quite different in nature and many vague notions will enter into the domain of the subject.

### *Keeton*

Keeton considers jurisprudence as "the study and systematic arrangement of the general principles of law". Jurisprudence considers the elements necessary for the formation of a valid contract but it does not attempt to enter into a full exposition of the detailed rules of the law of contract, either in English law or in other systems. It analyses the notion of status and considers the most important examples, but it does not consider exhaustively the points in which persons of abnormal status differ from ordinary persons. Jurisprudence deals with the distinction between

public and private laws and considers the contents of the principal departments of law (*Elementary Principles of Jurisprudence*, pp. 1-2).

### *Pound*

Dean Roscoe Pound defines jurisprudence as "the science of law, using the term law in the juridical sense, as denoting the body of principles recognised or enforced by public and regular tribunals in the administration of justice". According to Gray, jurisprudence is "the science of law, the statement and systematic arrangement of the rules followed by the courts and the principles involved in those rules". Lee writes that jurisprudence "is a science which endeavours to ascertain the fundamental principles of which law is the expression. It rests upon the law as established facts ; but at the same time it is a power in bringing law into a coherent system and in rendering all parts thereof subservient to fixed principles of justice". According to C. K. Allen, "jurisprudence is the scientific synthesis of all the essential principles of law". The view of G.W. Paton is that "jurisprudence is a particular method of study, not of law of one country, but of the general notion of law itself. It is a study relating to law". Clark writes that jurisprudence is the science of law in general. It does not confine itself to any particular system of law but applies to all the systems of law or to most of them. It gives the general ideas, conception and fundamental principles on which all or most of the systems of laws of the world are based.

The view of Julius Stone is that jurisprudence is the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law

Dias and Hughes describe jurisprudence as "any thought or writing about law, other than a technical exposition of a branch of the law itself. So, if X writes a book about the economic effect on the families of convicted prisoners on their convictions, this could be called a contribution to jurisprudence. If Y writes a book on theories of justice in the ancient world, this too would be a contribution to jurisprudence. If Z describes how the development of English case law is governed by the psychology of the judges, this would also fall within the scope of our subject.

Sometimes qualifying adjectives are tacked on to the noun, so that X's book might be called a study in 'Economic Jurisprudence', Y's book an example of 'Philosophical Jurisprudence', and Z's book one on 'Psychological Jurisprudence'; but, with or without the qualifying adjectives, it would be within the modern sense of the word to describe all three books as being works of jurisprudence". (*Jurisprudence*, pp 3-4).

Jurisprudence is a study of the fundamental legal principles. At the present juncture, the term jurisprudence may tentatively be described as any thought or writing about law and its relation to other disciplines such as philosophy, psychology, economics, anthropology and many others. It is to be determined from the expositions of law itself. Modern jurisprudence trenches on the fields of social sciences and philosophy. It digs into the historical past and attempts to create the symmetry of a garden out of the luxuriant chaos of conflicting legal systems. It includes whatever law thinks, says and does in any field of human society. It includes political, social, economic and cultural ideas.

### Scope of Jurisprudence

There is no unanimity of opinion regarding the scope of jurisprudence. Different authorities attribute different meanings and varying premises to law and that causes difference of opinions with regard to the exact limits of the field covered by jurisprudence. Jurisprudence has been so defined as to cover moral and religious precepts also and that has created confusion. It goes to the credit of Austin that he distinguished law from morality and theology and restricted the term to the body of rules set and enforced by the sovereign or supreme law-making authority within the realm. Thus, the scope of jurisprudence was limited to the study of the concepts of positive law and ethics and theology fall outside the province of jurisprudence.

There is a tendency to widen the scope of jurisprudence and at present we include what was previously considered to be beyond the province of jurisprudence. The present view is that the scope of jurisprudence cannot be circumscribed or regimented. It includes all concepts of human order and human conduct in State and society. Anything that concerns order in the State and society falls under the domain of jurisprudence. P B. Mukherji writes that new

jurisprudence is "both an intellectual and idealistic abstraction as well as behaviouristic study of man in society. It includes political, social, economic and cultural ideas. It covers the study of man in relation to State and society".

Thurman W. Arnold defines jurisprudence "as the shining but unfulfilled dream of a world governed by reason. For some, it lies buried in a system, the details of which they do not know. For some, familiar with the details of the system, it lies in the depth of an unreal literature. For others, familiar with its literature, it lies in the hope of a future enlightenment. For all, it is just around the corner".

The view of Lord Radcliffe is that jurisprudence is a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. (*The Law and Its Compass*, pp. 92-93). Karl Llewellyn observes: "Jurisprudence is as big as law—and bigger". (*Jurisprudence*, p. 372).

### Approach to Study of Jurisprudence

The traditional classification of approaches into analytical, historical, ethical and sociological has been rejected. The new approaches are the empirical and *a priori* approaches. The former proceeds from facts to generalisations and the latter starts with a generalisation in the light of which facts are examined. An *a priori* generalisation must have been constructed on an empirical basis and an empirical investigation is often greatly facilitated by *a priori* concept as a starting point. Thus, a constant use is made of both the approaches. The particular basis of approach derives its material exclusively from one system of law. The comparative basis of approach derives its material from more than one system. The general basis presupposes certain notions common to all or a large number of systems. Jurisprudence is regarded primarily as a discipline in how to think for oneself and not something to know. Its value lies in the analysis from which conclusions may be drawn and not the formulation of any final conclusion.

### Significance and Utility of Jurisprudence

It is sometimes said that jurisprudence has no practical utility as it is an abstract and theoretical subject. Salmond does not agree with this view. According to him, there is its own intrinsic

interest like other subjects of serious scholarship. Just as a mathematician investigates the number theory not with the aim of seeing his findings put to practical use but by reason of the fascination which it holds for him, likewise the writer on jurisprudence is impelled to his subject by its intrinsic interest. It is as natural to speculate on the nature of law as on the nature of light. Researches in jurisprudence may have repercussions on the whole of legal, political and social thought.

Jurisprudence also has practical value. Progress in science and mathematics has been largely due to increasing generalisation which has unified branches of study previously distinct, simplified the task of both scientist and mathematician and enabled them to solve by one technique a whole variety of different problems. Generality can also mean improvement in law. The English law relating to negligence has progressed from a host of individual rules about particular types of situations to a general principle. One of the tasks of jurisprudence is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. In this way, theory can help to improve practice.

Jurisprudence also has an educational value. The logical analysis of legal concepts sharpens the logical technique of the lawyer. The study of jurisprudence can also help to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of law. Law is to be put in its proper context by considering the needs of society and by taking note of the advances in related and relevant disciplines. A proper grasp of the law of contract may require some understanding of economics and economic theory, a proper grasp of criminal law, some knowledge of criminology and psychiatry and a proper grasp of law in general and some acquaintance with sociology. Jurisprudence can teach the people to look, if not forward, at least sideways and around them and realise that answers to new legal problems must be found by a consideration of the present social needs and not in the wisdom of the past.

Jurisprudence is often said to be "the eye of law". It is the grammar of law. It throws light on the basic ideas and the



fundamental principles of law. To quote Holland: "The ever renewed complexity of human relations calls for an increasing complexity of legal details, till a merely empirical knowledge of law becomes impossible" (*Elements of Jurisprudence*, p. 1)

By understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual rules of law. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which subject rests.

Some logical training is necessary for a lawyer which he can find from a study of jurisprudence. Jurisprudence trains the critical faculties of its students so that they can detect fallacies and use accurate legal terminology and expression. In his practical work, a lawyer has to tackle new and difficult problems which he can handle through his knowledge of jurisprudence which trains his mind into legal channels of thought. For example, a question may arise whether a certain person is entitled to certain property by virtue of his adverse possession for more than the prescribed period of time. His knowledge of jurisprudence will tell him what constitutes possession and that will help him in tackling the problem before him.

A study of jurisprudence helps legislators by providing them a precise and unambiguous terminology. It relieves them of the botheration of defining again and again in each Act certain expressions such as right, duty, possession, ownership, liability, negligence etc.

The study of jurisprudence enlightens students and helps them in adjusting themselves in society without causing injuries to the interests of other citizens. J. G. Phillimore observes: "Such is the exalted science of jurisprudence, the knowledge of which sends the students into civil life, full of luminous precepts and notions, applicable to every exigency of human affairs." (*Principles and Maxims of Jurisprudence*, p. 30).

Jurisprudence helps the judges and the lawyers in ascertaining the true meanings of the laws passed by the legislatures by providing the rules of interpretation.

According to Dr. M. J. Sethna, the value of jurisprudence lies in examining the consequences of law and its administration

on social welfare and suggesting changes for the betterment of the superstructure of laws.

The true purpose of the study of jurisprudence should not be confined to the study of positive law alone but must include normative study. That study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances. We agree with Pound's theory of the "functional attitude", regarding law as "social engineering, the utility of which should be tested every now and then by the jurists who should improve its quality at every stage. The very vagueness of the concept should serve as a challenge to legal thinkers in the country and that should encourage all lawyers and jurists on an inquiry as to the sense of societal values which should be nursed and nurtured in order to build a proper legal system which will serve as an efficient vehicle of socio-economic justice".

Prof. R.W.M. Dias writes that the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence. Teachers of law hope to encourage their pupils to learn how to think rather than what to know and jurisprudence is peculiarly suited to this end. (*Jurisprudence*, Preface, p. vii).

### **Relation of Jurisprudence with other Social Sciences**

Different branches of knowledge are so inter-related that none of them can be studied in isolation. All social sciences stand in close connection with one another. All of them study the actions of human beings living in society, though from different angles and with different ends. To quote Paton: "Modern jurisprudence trenches on the fields of social sciences and of philosophy; it digs into the historical past and attempts to create the symmetry of a garden out of the luxuriant chaos of conflicting legal systems." (*A Text Book of Jurisprudence*, p. 1). Julius Stone defines jurisprudence in terms of the knowledge of other sciences. To quote him: "Jurisprudence then in the present hypothesis is the lawyer's extraversion. It is lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than law." (*Province and Function of Law*, p. 25). Justice McCardie emphasises the indispensability

of the study of other social sciences in these words : "There never was a time when the barrister had greater need of a wide culture and of a full acquaintance with history, with economics and with sociological science."

Dean Roscoe Pound of the Harvard Law School writes : "Jurisprudence, ethics, economics, politics and sociology are distinct enough at the core, but shade out into each other. When we look at the core or chiefly at the core, the analytical distinctions are sound enough. But we shall not understand even that core, and much less the debatable ground beyond, unless we are prepared to make continual deep incursions from each into each of others. All the social sciences must be co-workers and emphatically all must be co-workers with jurisprudence" (*Law and Morals*, p. 115).

### **Jurisprudence and Sociology**

(According to Salmond, jurisprudence is the knowledge of law and in that sense all law books can be considered as books on jurisprudence. Among the phenomena studied by sociologists is law also and that makes sociology intimately connected with jurisprudence. The attitude of the sociologists towards law is different from that of a lawyer who, in his professional capacity, is concerned with the rules which have to be obeyed by the people. He is not interested in knowing how and to what extent those rules actually govern the behaviour of the ordinary citizen. A book on the law of torts or contract deals with the rules relating to torts and contract but does not mention how often torts and breaches of contract are committed. A lawyer is essentially interested in those who frame the rules and execute them in a given society.

There is a separate branch of sociological jurisprudence based on sociological theories and is essentially concerned with the influence of law on society at large, particularly social welfare. The sociological approach to legal problems is essentially different from that of a lawyer. In the case of crime in society, its causes are to a very great extent sociological and to understand their pros and cons, one must have a knowledge of society.

(Sociology has helped jurisprudence in its approach to the problem of prison reforms and has suggested ways and means of

preventing social wrongs.) Previously, judges and legislators came to their conclusions regarding the effect of punishment by depending upon popular opinion and personal impressions, but now they have at their disposal precise data through the efforts of criminologists. Their decisions are no more conjectural but are based on solid facts. There is a general indignation against hanging as the extreme form of punishment and hence its abolition in many countries of the world.

(Behind all legal aspects, there is something social. The causes of crimes are partly sociological and an understanding of sociology helps the legislators in their task of prison reform and prevention of crime. Topics like motives, aims and theories of punishment and the efficacy of the various types of punishments are considerably helped by sociology. The birth and growth of sociology has given a new orientation to the study of jurisprudence.)

There is a distinction between sociological jurisprudence and the sociology of law. The latter differs mainly from the former in that "it attempts to create a science of social life as a whole, and to cover a great part of general sociology and political science". In the sociology of law, the emphasis is on society but in sociological jurisprudence emphasis is on the relation between law and society. The sociology of law is a branch of sociology dealing with law and legal institutions in the light of sociological principles, aims and methods.

The view of Paton is that the relationship between law and social interests can be usefully studied by jurisprudence for three reasons. It enables us to understand better the evolution of law. For example, an attempt to explain law on a purely logical basis ignoring social interests, is equivalent to interpreting a graph of the vibrations in a speeding motor car without taking into account the surface of the road. Although man's view of ethics and his social needs have changed over the centuries, the element of human interest provides a greater substratum of identity than the logical structure of law. Although German law adopted the subjective theory of contract and English law has preferred an objective approach, each has been forced to adapt its theoretical basis to the needs of modern commerce. Although the view of

certain jurists like Kelsen that jurists should not discuss the question of social interests, is attractive, yet such a study is essential to a lawyer in order to enable him to properly understand the legal system.

### **Jurisprudence and Psychology**

(Psychology has been defined as the science of mind and behaviour. It is recognised that no human science can be discussed properly without a thorough knowledge of the human mind and hence its close connection with jurisprudence. In the study of criminal jurisprudence, there is great scope for the study of psychological principles in order to understand the criminal mind behind the crime. Both psychology and jurisprudence are interested in solving such questions as the motive for crime, a criminal personality, whether a criminal gets pleasure in committing a crime, why there are more crimes in one society than in another and what punishment should be given in any particular case. In criminology, psychology plays an important part. It is the duty of a lawyer to understand the criminal and the working of a criminal mind.)

It is the duty of a law-giver to understand man and not to pass judgments and say what man ought to do or ought not to do. Psychology can help the law-maker considerably in the approach to the problem of not only making the law but also of executing it.

Jurisprudence is concerned with man's external conduct and not his thoughts and mental processes, but penology has benefited from the knowledge made available by psychological researches.

There is a school of jurists which holds the view that the sanction behind all laws is a psychological one. Study of negligence, intention, motive and other cognate mental conditions forms part of both jurisprudence and psychology.

### **Jurisprudence and Ethics**

Ethics has been defined as the science of human conduct. It deals with how man behaves and what should be the ideal human behaviour. There is the ideal moral code and the positive moral code. The former belongs to the province of natural law, while the latter deals with the rules of positive or actual conduct. Ethics is concerned with good or

proper human conduct in the light of public opinion. Public opinion varies from place to place, from time to time and from people to people. Dr. Sethna writes: "It changes in the furnace of social evolution, social culture and social development. What may be a rule of good morality at one time may be a bad moral today."

Jurisprudence is related to positive morality in so far as law is considered as the instrument through which positive ethics tries to assert itself. Positive morality is not dependent upon the good actions of a good man only. It requires a strong coercive influence for maintaining public conscience. There is a separate branch of ethical jurisprudence which tries to examine the existing ethical opinions and standards of conduct in terms of law and makes suggestions for necessary changes so that it can properly depict the public conscience.

There are many ethical rules of conduct which are not considered as crimes. The law ignores trifles. It may be immoral to tell a lie but it is not a crime. Many acts are unethical but all unethical acts are not necessarily criminal. One has to consider the problem of laws which are considered undesirable by society. All that is prohibited by law is not necessarily immoral. For enforcing certain ethical conduct, ethics depends upon law through the instrumentality of the police, law courts, judges and the system of courts and punishment. Legislation must be based on ethical principles. It must not be divorced from human values. No law can be good law if it is not based on sound ethical principles.

Ethics lays down the rules for human conduct based upon higher and nobler values of life. Laws are meant for regulating human conduct in the present and subordinating the requirements of the individual to that of society at large. A jurist must be adept at the science of ethics because he cannot criticise a law unless he examines that law through the instrumentality of ethics.

Although Austin separated jurisprudence from ethics, jurisprudence must not be divorced from ethics altogether. The reason is that if ethical values are excluded from jurisprudence, it shall be in "the formalistic vacuum of the sanctuary of the State

barring the road to all contact with life or society". It shall be reduced to a "system of rather arid formalism".

Dr. Sethna writes: "In the mirror of a community's laws are reflected its culture, its ideology and its Miranda. On the high level of its laws is perceived the glory of a country's civilisation—the depth of its positive ethics. Hence the relationship between ethics and jurisprudence."

### **Jurisprudence and Economics**

Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Economics is the science of wealth and jurisprudence is the science of law. There is a close relationship between the two. Very often, economic factors are responsible for crimes. Economic problems arise from day to day and it is the duty of the law-giver to tackle those problems. The aim of the economist is to improve the standard of life of the people and also to develop their personality. Jurisprudence teaches legislators how to make laws which will promote social and economic welfare. Both jurisprudence and economics aim at the betterment of the lives of the people. There are laws relating to workmen's compensation, factory legislation, laws relating to labour, insurance, maternity welfare, bonus, leave facilities and other concessions given to workmen. There are laws for the benefit of the agriculturists such as the Zamindari Abolition Acts, Agricultural Debtors Relief Acts, Acts preventing the fragmentation and sub-division of agricultural holdings and regulation of agricultural labour. Both jurisprudence and economics help each other in furthering the welfare of society.

The intimate relation between economics and jurisprudence was first emphasized by Karl Marx and the interpretation of jural relations in the light of economic factors is receiving serious attention at the hands of jurists.

### **Jurisprudence and History**

History studies past events in their different perspectives. The relation between jurisprudence and history is so close that there is a separate historical school of jurisprudence. History furnishes the background in which a correct idea of jurisprudence can be realised.

## Jurisprudence and Politics

Friedmann rightly points out that jurisprudence is linked at one end with philosophy and at the other end with political theory. Politics deals with the principles governing governmental organisation. In a politically organised society, there exist regulations which may be called laws and they lay down authoritatively what men may do and what they may not do.

## Synthetic Jurisprudence

The necessity for synthetic jurisprudence arises from the fact that it is necessary to determine the truth from all aspects and from different angles. Analytical jurisprudence, studied separately, does not give anything more than an understanding of the legal concepts as they prevail in various legal systems. This in itself is useful but we cannot stop after merely analysing the problem. We will be in a better position if we discuss the historical aspects of the legal ideas, problems or principles and go further in the light of philosophical norms and sociological requirements. The historical jurists lay emphasis on historical jurisprudence and refuse to recognise the other branches of jurisprudence.

The first thing to be done in the study of jurisprudence is to understand the fundamental principles analytically. When that is done, we should turn to its historical aspects. We must trace the origin of the legal ideas and principles and sources of law. Our knowledge and experience of the past would help us to be wise in the present and forewarned for the future. Philosophical jurisprudence enables us to trace the philosophical basis of our laws and consider the legal principles in the light of philosophical norms. A comparative study of law is useful as a thorough study of the legal systems of other countries enables us to improve the legal machinery of our own country. Sociological jurisprudence helps us to study the fundamental principles of law.

Knowledge is a synthetic whole and cannot be divided into watertight compartments. It is our duty to amalgamate half-truths in order to form the whole truth. Synthesis enables us to reconcile the conflicting theories. In synthetic jurisprudence, we study the various topics and theories from the point of view of synthesis. We analyse, we retrospect, we compare, we philosophise, we socialise and we synthesise. The fruits of synthesis are well-balanced



and well-digested truths. The advocates of synthetic jurisprudence consider jurisprudence as a study of fundamental legal principles, including their historical, philosophical, scientific and sociological basis and including an analysis of legal concepts. They point out that jurisprudence is history ; it is philosophy ; it is a science and it is concerned with altruistic utilitarianism.

There are many advocates of synthetic jurisprudence. Prof. Jerome Hall is an advocate of integrated jurisprudence in the United States. His view is that "if we could cultivate the æsthetic impulse of the system-builder, we would have all the interests needed to achieve a significant synthesis of jurisprudential thought". He wants that the legal philosophers should concentrate upon legal theory which has been constructed slowly and painstakingly over the centuries by specialists in contracts, torts, criminal law and other basic branches of law, as the bridge between jurisprudence and law.

Though Dean Roscoe Pound does not speak of synthetic jurisprudence, his treatment of the subject is similar to that of Hall. He explains all the methods of jurisprudence and then discusses the various topics of jurisprudence in a systematic form, after giving an account of the various schools of jurisprudence. He deals with the nature of law and justice according to law. He explains the scope and subject-matter of law and also the sources, forms and modes of the growth of law. He discusses under various headings all the branches or types of jurisprudence and applies practically all the recognised methods.

Julius Stone deals with all kinds of jurisprudence, whether analytical, comparative, philosophical, historical or sociological, in a systematic manner. He does not stand for a hotch-potch of them but he believes in dealing with all types of jurisprudence in one book. Lord Dennis Lloyd is also an advocate of synthetic jurisprudence. In his book *Introduction to Jurisprudence*, he has advocated the necessity for synthesis.

Dr. M. J. Sethna is the strongest exponent of synthetic jurisprudence in India. According to him, jurisprudence is the study of fundamental legal principles, including their philosophical, historical and sociological basis and an analysis of legal concepts. Dr. Sethna refers to his definition of civil law. According to him,

civil law is all that body of principles, decisions and enactments made, passed or approved by the legally constituted authorities or agencies in a State for regulating rights, duties and liabilities and enforced through the machinery of the judicial process, securing obedience to the sovereign authority in the State. The view of Dr. Sethna is that his definition of civil law gives a complete idea of civil law as it includes both abstract and concrete aspects of civil law. Dr. Sethna also refers to his theory of negligence. According to him, negligence is the faulty behaviour arising out of the lethargy of the mind or faulty thinking. Negligence is a faulty negative act. It is a failure of the duty to take as much care as a normal person is expected to take under the circumstances. Negligence is both objective and subjective.

Dr. Sethna refers to his quasi-realist theory regarding the personality of corporations. According to the fiction theory, the personality of a corporation is not real but fictitious. According to the realist theory, a corporation has real and not a fictitious personality. According to Dr. Sethna, the correct view is the synthetic view according to which the personality of the corporation is neither completely real nor truly fictitious. It is quasi-real and quasi-fictitious.

The view of Dr. Sethna is that every topic should be fully considered from all angles—historically, philosophically, analytically, comparatively and sociologically. It is only then that a true picture emerges. If we deal with the subject of property, we should analyse the concepts of property, proprietary rights, personal rights, legal and equitable rights etc. We should make a comparative study of those concepts and examine them historically and critically. What Dr. Sethna emphasises is that all the jurisprudential aspects of the subject must be considered at one place. He does not believe in having separate chapters on analytical jurisprudence, historical jurisprudence, philosophical jurisprudence or sociological jurisprudence. He stands for combining all the types and thus give a synthetic discussion under each topic heading.

## SUGGESTED READINGS

- Allen, C.K. : *Legal Duties*, Oxford, Clarendon Press, 1931.
- Austin, J. : *Lectures on Jurisprudence*, 5th Ed., R. Campbell, John Murray, 1885.
- Bentham, J. : *An Introduction to the Principles of Morals and Legislation*, (Eds. J.H. Burns and H.L.A. Hart), The Atholone Press, 1970.
- Bodenheimer, E. : *Jurisprudence*, Harvard University Press, 1962.
- Brett, P. : *An Essay on Contemporary Jurisprudence*, Butterworths, 1975.
- Brown, W.J. : *The Austrian Theory of Law*, John Murray, 1906.
- Bryce, J. : *Studies in History and Jurisprudence*, Oxford, 1901.
- Buckland, W.W. : *Some Reflections on Jurisprudence*, Cambridge University Press, 1945.
- Cairns, H. : *Legal Philosophy from Plato to Hegel*, John Hopkins Press, 1949.
- Cairns, H. : *The Theory of Legal Science*, The University of North Carolina Press, 1941.
- Castberg, F. : *Problems of Legal Philosophy*, 2nd Ed., Oslo University Press; Allen & Unwin Ltd., 1957.
- Cohen, M R. : *Reason and Law*, The Free Press, Glencoe, 1950.
- Dei Vecchio, G. : *Philosophy of Law*, trans T.O. Martin, The Catholic University of America Press, 1953.
- Dias, R W.M. : *A Bibliography of Jurisprudence*, Butterworths, London, 1979.
- Dias, R.W.M : *Jurisprudence*, Butterworths, London, 1976.
- Dias and Hughes : *Jurisprudence*.
- Eastwood, R A. and Keeton, G.W. : *The Austrian Theories of Law and Sovereignty*, Methuen & Co. Ltd, 1929.
- Freeman, M D A. : *The Legal Structure*, London, 1974.
- Goodhart, A L. : *Interpretations of Modern Legal Philosophies*, Ed. P. Sayre, Oxford University Press, New York, 1947.
- Gray, J.C. : *The Nature and Sources of the Law*, 2nd Ed., R. Gray, The Macmillan Co., New York, 1921.
- Hall, J. : *Foundations of Jurisprudence*, The Bobbs-Merrill Co. Inc., 1973.
- Hall, J. : *Studies in Jurisprudence and Criminal Theory*, Oceana Publications Inc., 1958.
- Hart, H.L.A. : *Essays in Jurisprudence and Philosophy*.
- Holland, T.E. : *The Elements of Jurisprudence*, 13th Ed., Oxford, Clarendon Press, 1924.
- Hostie : *Outlines of Jurisprudence*.
- Jenks, E. : *The New Jurisprudence*, John Murray, 1933.

- Jolowicz, H.F. : *Lectures on Jurisprudence*, Ed. J.A Jolowicz, The Athlone Press, 1963.
- Keeton, G.W. : *The Elementary Principles of Jurisprudence*, 2nd Ed., Pitman & Sons Ltd., 1949.
- Lightwood, J.M. : *The Nature of Positive Law*, Macmillan & Co., 1883.
- Lindley : *Introduction to the Study of Jurisprudence*.
- Llewellyn, Karl . *Jurisprudence*, 1962.
- Lloyd, D. : *Introduction to Jurisprudence*, 3rd Ed., Stevens & Sons Ltd., 1979.
- Lloyd, D. : *The Idea of Law*, Penguin Books Ltd., 1964.
- Markby : *Elements of Law*.
- Mukherji, P.B. : *New Jurisprudence*.
- Osborne : *Jurisprudence*.
- Paton, G.W. . *A Text Book of Jurisprudence*, 4th Ed , G. W. Paton and D P. Derham, Oxford, Clarendon Press, 1972.
- Patterson, W E. . *Jurisprudence*, The Foundation Press Inc., 1953.
- Phillimore, J.G . *Principles and Maxims of Jurisprudence*.
- Pollock, F. . *Essays in Jurisprudence and Ethics*, Macmillan & Co., 1882.
- Popper, K.R. : *Poverty of Historicism*, Routledge & Kegan Paul, 1957.
- Pound, R. : *Jurisprudence*, West Publishing Co', 1959.
- Pound, R. : *Jurisprudence in Action*, Baker, Voorhis & Co. Inc., 1953.
- Radcliffe, Lord : *The Law and Its Compass*, 1961.
- Ross, A. : *On Law and Justice*, Stevens & Sons Ltd., 1958.
- Salmond, J.W. : *Jurisprudence*, 7th Ed by J.W. Salmond; 12th Ed. by P.J. Fitzgerald, Sweet & Maxwell Ltd., 1979.
- Sawer : *Law in Society*.
- Sethna, M.J. : *Essays in Jurisprudence in Honour of Roscoe Pound*, Ed., R.A. Newman, The Bobbs-Merill Co Inc., 1962.
- Sethna, M.J. . *Synthetic Jurisprudence*.
- Stone, Julius : *Legal System and Lawyer's Reasonings*, 1964.
- Stone, Julius : *The Province and Function of Law*.
- Summers, R S. : *Essays in Legal Philosophy*, Ed. R S. Summers, Basil Blackwell, Oxford, 1968.
- Synder, O.C. : *Preface to Jurisprudence*, 1954.
- Vinogradoff, P. : *Outlines of Historical Jurisprudence*, Oxford University Press, 1922.

## II

# THE NATURE OF LAW

### Definition of Law

In the words of Thurman Arnold : "Obviously, law can never be defined. With equal obviousness, however, it should be said that the adherents of the legal institution must never give up the struggle to define law, because it is an essential part of the ideal that it is rational and capable of definition. Hence the verbal expenditure necessary in the upkeep of the ideal of 'law' is colossal and never ending. The legal scientist is compelled by the climate of opinion in which he finds himself to prove that an essentially irrational word is constantly approaching rationality." (*The Symbols of Government*, 1935, pp. 36-37). A similar view is expressed by Lord Lloyd : "Since much juristic ink has flowed in an endeavour to provide a universally acceptable definition of law, but with little sign of attaining that objective " (*Introduction to Jurisprudence*, p. 42). R. Wollheim points out that much of the confusion in defining law has been due to the different types of purpose sought to be achieved.

Morris writes : "To a zoologist, a horse suggests the genus mammalian quadruped, to a traveller a means of transportation, to an average man the sports of kings, to certain nations an article of food." Likewise, law has been variously defined by various individuals from different points of view and hence there could not be and is not any unanimity of opinion regarding the real nature of law and its definition. There is a lot of literature on the subject of law and in spite of that, different definitions of law have been given.

Various schools of law have defined law from different angles. Some have defined it on the basis of its nature. Some concentrate mainly on its sources. Some define it in terms of its effect on

society. There are others who define law in terms of the end or purpose of law. A definition which does not cover various aspects of law is bound to be imperfect. Moreover, law is a social science and grows and develops with the growth and development of society. New developments in society create new problems and law is required to deal with those problems. In order to keep pace with society, the definition and scope of law must continue to change. The result is that a definition of law given at a particular time cannot remain valid for all times to come. A definition which is considered satisfactory today may be found narrow tomorrow. Prof. Keeton rightly points out that "to attempt to establish a single satisfactory definition of law is to seek to confine jurisprudence within a straitjacket from which it is continually striving to escape". Prof. H. L. A. Hart writes: "Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strained and even paradoxical ways as the question 'What is law?'." (*The Concept of Law*, p. 1). Pollock observes: "No tolerably prepared candidate in an English or American Law School will hesitate to define an estate in fee simple, on the other hand, the greater a lawyer's opportunities for knowledge have been, and the more time he has given to the study of legal principles, the greater will be his hesitation in the face of the apparently simple question 'What is law?'."

According to Justinian: "Law is the king of all mortal and immortal affairs, which ought to be the chief, the ruler and the leader of the noble and the base and thus the standard of what is just and unjust, the commander to animals naturally social of what they should do, the forbidding of what they should not do." Ulpian defined law as "the art or science of what is equitable and good". Cicero said that law is "the highest reason implanted in nature". Pindar called law as "the king of all, both mortals and immortals".

Demosthenes wrote: "Every law is a gift of God and a decision of sages." Again, "this is law to which all men yield obedience for many reasons and especially because every law is a discovery and gift of God and at the same time a decision of wise men, a rightening of transgressions, both voluntary and involuntary, and the common covenant of a State, in accordance with which it beseeches all men in the State to lead their lives".

Chrysiphus defined law as "the common law which is the right reason, moving through all things, and identical with Zeus, the Supreme Administrator of the universe". According to Capito, "a *lex* is a general command of the people or the plebs on question by a magistrate". Anaximenes writes. "Law is a definite proposition, in pursuance of a common agreement of a State intimating how everything should be done." According to Hobbes: "Law is the speech of him who by right commands somewhat to be done or omitted." Again, "law in general is not counsel but command; nor a command of any man to any man but only of him whose command is addressed to one formerly obliged to obey him. And, as for civil law, it addeth only the name of the highest person commanding which is *persona civilis*, the highest person of the commonwealth."

Blackstone writes: "Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of actions, whether animate or inanimate, rational or irrational. Thus, we say the laws of gravitation, or optics or mechanics, as well as the laws of nature and of nations."

Hooker defines law as "any kind of rule or canon whereby actions are framed... that which reason in such sort defines to be good that it must be done". Again, "of law there can be no less acknowledged than that her seat in the bosom of God, her voice the harmony of the world, all things in Heaven and Earth does her homage, the very least as feeling her care and the greatest as not exempted from her power; both angels and men and creatures of what condition so ever; though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy".

The view of Kant was that law is "the sum total of the conditions under which the personal wishes of one man can be combined with the personal wishes of another man in accordance with the general law of freedom". Hegel defined law as "the abstract expression of the general will existing in and for itself".

Sir Henry Maine writes: "The word 'law' has come down to us in close association with two notions, the notion of order and the notion of force."

Savigny says that law is "the rule whereby the invisible borderline is fixed within which the being and the activity of each individual obtains a secure and free space". According to Vinogradoff, law is "a set of rules imposed and enforced by a society with regard to the distribution and exercise of powers over persons and things"

According to Austin, "law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject". In other words, law is the command of the sovereign. It imposes a duty and is backed by a sanction. Command, duty and sanction are the three elements of law.

Kelsen defines law as the depsychologized command. Though Kelsen defines law in terms of command, he uses that term differently from Austin. The sovereign of Austin does not come into the picture in the definition of law as given by Kelsen.

Duguit defines law as essentially and exclusively a social fact. The foundation of law is in the essential requirements of the community life. It can exist only when men live together. The sovereign is not above the law but bound by it. Law should be based on social realities. Duguit excluded the notion of 'right' from law.

Ihering defines law as "the form of the guarantee of the conditions of life of society, assured by State's power of constraint". Law is treated only as a means of social control. It is to serve social purpose. It is coercive in character. Obedience to law is secured by the State through external compulsion.

Ehrlich includes in his definition of law all the norms which govern social life within a given society. Pound defines law as "a social institution to satisfy social wants".

Justice Holmes says: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through courts". Again, "the prophecies of what the court will do in fact and nothing more pretentious, are what I mean by law." According to Gray: "The law of the State or of any organised body of men is composed of the rules which the courts—that is, the judicial organs of that body—lay down for the determination of legal rights and duties."



Cardozo writes: "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is a principle or rule of law." Holland says: "More briefly, law is general rule of eternal human action enforced by a sovereign political authority. All other rules for the guidance of human action are laws merely by analogy; and propositions which are not rules for human action are laws by metaphor only."

According to Bentham: "Law or the law, taken indefinitely, is an abstract or collective term, which when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together." Salmond defines law as "the body of principles recognised and applied by the State in the administration of justice".

According to Paton, the term law may be defined from the point of view of the theologian, the historian, the sociologist, the philosopher, the political scientist or the lawyer. Law may be used in a metaphorical sense. Law may be defined firstly by its basis in nature, reason, religion or ethics. Secondly, it may be defined by its source in customs, precedents or legislation. In the third place, it may be defined by its effect on the life of society. Fourthly, it may be defined by the method of its formal expression or authoritative application. In the fifth place, it may be defined by the ends that it seeks to achieve. Paton himself defines law in these words: "Law may be described in terms of a legal order tacitly or formally accepted by a community, and it consists of the body of rules which that community considers essential to its welfare and which it is willing to enforce by the creation of a specific mechanism for securing compliance. A mature system of law normally sets up that type of legal order known as the State, but we cannot say *a priori* that without the State no law can exist."

According to Lord Moulton: "Law is the crystallized commonsense of the community."

Prof. M. J. Sethna writes: "Law in its widest sense means and involves a uniformity of behaviour, a constancy of happenings or a course of events, rules of action, whether in the phenomena of nature or in the ways of rational human beings. In the synthetic sense, civil law is all that body of principles, decisions and

enactments made, passed or approved by the legally constituted authorities or agencies in a State, for regulating rights, duties and liabilities (between the State and the citizens, as also the citizens *inter se*, and the citizens of the State in relation to members of foreign States), and enforced through the machinery of the judicial process, securing obedience to the sovereign authority in the State."

From what has been stated above, it follows that law presupposes State. There may be law even without the State such as primitive law, but law in the modern sense of the term implies a State. The State makes or authorises to make, recognises or sanctions rules which are called law. For the rules to be effective, there are sanctions behind them. Rules are made to serve some purpose. That purpose may be a social purpose or the personal ends of a despot.

### Austin's Theory of Law

Austin's theory of law is also known as the imperative theory of law. According to Austin, positive law has three main features. It is a type of command. It is laid down by a political sovereign. It is enforceable by a sanction. A typical example would be the Road Traffic Act, 1960 which could be described as a command laid down by the sovereign under the English legal system. This Act lays down certain rules which have to be followed (command). It has been passed by the Queen-in-Parliament (laid down by the sovereign authority of England). Its violations are met with penalties (sanction).

According to Austin, requests, wishes etc. are expressions of desire, while commands are expressions of desire given by superiors to inferiors. The relationship of superior to inferior consists for Austin in the power which the former enjoys over the other, i.e., his ability to punish him for disobedience. In a sense, the idea of sanction is built into the Austinian notion of command. Logically, it might be more correct to say that law has two rather than three distinguishing features.

There are commands which are laws and there are commands which are not laws. Austin distinguishes laws from other commands by their generality. Laws are general commands. Laws are not like the transitory commands given on parade grounds

and obeyed there and then by the troops. Laws are like the standing orders of a military station which remain in force generally and continuously for all persons on the station. However, there can be exceptions. There can exist laws such as acts of attainder which lack the characteristic of generality. Hence, generality alone is neither necessary nor sufficient to serve as the distinguishing feature of law.

Some have criticised the positivist theory of law as a theory of "gunman law" on the ground that it makes no real distinction between a law and the command of a bank robber who points his gun at the bank clerk and orders him to hand over the contents of the till. This criticism overlooks Austin's second requirement of law which requires that only that command is law which is given by a political superior or sovereign. To Austin, a sovereign is any person or body of persons whom the bulk of a political society habitually obeys and who does not himself habitually obey some other person or persons. One difference between the order of a gunman and the decree of a dictator is that the latter enjoys a general measure of obedience while the former secures a much more limited compliance.

According to Austin, law is law only if it is effective and it must be generally obeyed. Perfect obedience is not necessary. Many contravene the law without depriving it of all effectiveness. Without general obedience, the commands of the law-maker are as empty as a language which is no longer spoken or a monetary currency which is no longer in use. They have the appearance of law but not the reality of law. A sovereign may enjoy obedience through conquest, usurpation or election. What is sufficient for a legal theorist is that such obedience exists.

According to Austin, laws are of two kinds, viz., divine law and human law. Divine law was given by God to men. Human laws are set by men for men. Human laws are of two kinds. There are certain human laws which are set by political superiors and are called positive laws and there are others which are not set by political superiors. To the second category belong the rules of a club or any other voluntary association.

According to Austin, laws strictly so called are one particular species of set rules and consist only of those which are set by a

sovereign person or a sovereign body of persons to a member or members of an independent political society wherein that person or body is sovereign or supreme. Positive law consists of commands set as general rules of conduct by a sovereign to a member or members of the independent political society wherein the author of the law is supreme. A command is the expression of a wish or desire to another so that he shall do a particular thing or refrain from doing a particular thing. In case of non-compliance with the command, he is to be visited with certain evil consequences. The power to inflict evil must be there and it should be intended to be exercised in the case of non-compliance. The sanction behind law is the evil which is to be inflicted in case of disobedience.

Austin puts great emphasis on the relation between law and sovereign. Law is law because it is made by the sovereign and sovereign is sovereign because it makes the law. The relation between the sovereign and law is the relation between the centre and the circumference.

### **Criticism of Austin's Theory of Law**

#### *1) Laws before State*

Austin's theory of law has been criticised on many grounds. The definition of law in terms of State has been criticised by the jurists belonging to the historical and sociological schools. Critics belonging to the historical school concede that in modern societies where there are established States, laws may be in the nature of command, but there existed laws even prior to the existence of the State. The law which existed prior to the State was not the command of the State. It had its source in custom, religion or public opinion and not in any authority vested in a political superior. According to this school, law is prior to and independent of political authority and enforcement. A State enforces it because it is already law. It is not correct that it becomes law because the State enforces it.

Although Salmond is not a supporter of the imperative theory of law but he does not accept the criticism of the historical school. He points out that the rules which were in existence prior to the existence of a political State were not laws in the real sense of the term. They resembled law. They were primitive substitutes for

and obeyed there and then by the troops. Laws are like the standing orders of a military station which remain in force generally and continuously for all persons on the station. However, there can be exceptions. There can exist laws such as acts of attainder which lack the characteristic of generality. Hence, generality alone is neither necessary nor sufficient to serve as the distinguishing feature of law.

Some have criticised the positivist theory of law as a theory of "gunman law" on the ground that it makes no real distinction between a law and the command of a bank robber who points his gun at the bank clerk and orders him to hand over the contents of the till. This criticism overlooks Austin's second requirement of law which requires that only that command is law which is given by a political superior or sovereign. To Austin, a sovereign is any person or body of persons whom the bulk of a political society habitually obeys and who does not himself habitually obey some other person or persons. One difference between the order of a gunman and the decree of a dictator is that the latter enjoys a general measure of obedience while the former secures a much more limited compliance.

According to Austin, law is law only if it is effective and it must be generally obeyed. Perfect obedience is not necessary. Many contravene the law without depriving it of all effectiveness. Without general obedience, the commands of the law-maker are as empty as a language which is no longer spoken or a monetary currency which is no longer in use. They have the appearance of law but not the reality of law. A sovereign may enjoy obedience through conquest, usurpation or election. What is sufficient for a legal theorist is that such obedience exists.

According to Austin, laws are of two kinds, viz., divine law and human law. Divine law was given by God to men. Human laws are set by men for men. Human laws are of two kinds. There are certain human laws which are set by political superiors and are called positive laws and there are others which are not set by political superiors. To the second category belong the rules of a club or any other voluntary association.

According to Austin, laws strictly so called are one particular species of set rules and consist only of those which are set by a

sovereign person or a sovereign body of persons to a member or members of an independent political society wherein that person or body is sovereign or supreme. Positive law consists of commands set as general rules of conduct by a sovereign to a member or members of the independent political society wherein the author of the law is supreme. A command is the expression of a wish or desire to another so that he shall do a particular thing or refrain from doing a particular thing. In case of non-compliance with the command, he is to be visited with certain evil consequences. The power to inflict evil must be there and it should be intended to be exercised in the case of non-compliance. The sanction behind law is the evil which is to be inflicted in case of disobedience.

Austin puts great emphasis on the relation between law and sovereign. Law is law because it is made by the sovereign and sovereign is sovereign because it makes the law. The relation between the sovereign and law is the relation between the centre and the circumference.

### **Criticism of Austin's Theory of Law**

#### **a) Laws before State**

Austin's theory of law has been criticised on many grounds. The definition of law in terms of State has been criticised by the jurists belonging to the historical and sociological schools. Critics belonging to the historical school concede that in modern societies where there are established States, laws may be in the nature of command, but there existed laws even prior to the existence of the State. The law which existed prior to the State was not the command of the State. It had its source in custom, religion or public opinion and not in any authority vested in a political superior. According to this school, law is prior to and independent of political authority and enforcement. A State enforces it because it is already law. It is not correct that it becomes law because the State enforces it.

Although Salmond is not a supporter of the imperative theory of law but he does not accept the criticism of the historical school. He points out that the rules which were in existence prior to the existence of a political State were not laws in the real sense of the term. They resembled law. They were primitive substitutes for

law but not laws. Salmond considers it to be a virtue of the imperative theory of law that it excludes those rules which resemble law but are not laws. Salmond supports his argument with an analogy. Apes might have resembled human beings. They might be in existence prior to men, but it is not a defect of a definition of man if it excludes apes from such definition. As a matter of fact, it is a merit of the definition.

Lord Bryce writes: "Broadly speaking, there are in every community two authorities which can make law: the State, i.e., the ruling and directing power, whatever it may be, in which the government resides, and the people, that is, the whole body of the community regarded not as incorporated in the State but as merely so many persons who have commercial and social relations with one another. Law cannot be always and everywhere the creation of the State because instances can be adduced where law existed in a community before there was any State." (*Studies in History and Jurisprudence*, Vol. II, p. 44). Pollock observes: "Not only law, but law with a good deal of formality has existed before the State had any adequate means of compelling its observance and indeed before there was any regular process of enforcement at all." Sir Henry Maine says: "At first sight, there can be no more perfect embodiment than Ranjit Singh of sovereignty as conceived by Austin. But he never made a law. The rules which regulated the lives of his subjects were derived from their immemorial usages and those rules were administered by domestic tribunals in families or village communities."

Malinowski maintains that even in primitive society there are rules behind which the community throws the whole weight of its organisation. The very structure of society is such that primitive man suffers if the rules are disobeyed. Although there is no intricate system of courts or police, the community directly entrusts itself in securing the observance of those rules which it considers essential. If primitive man does not meet his customary obligations, he knows that in future no one will help him. Apart from the community, primitive man is helpless. The threat of expulsion or death is a salutary one for prospective offenders. Because in so many cases the community leaves primitive man to enforce his own rights by self-help, we must not leap to the conclusion that

there are no rules the breach of which is regarded as fatal to community life.

### (12) Generality of Law

According to Austin, law is a general rule of conduct, but that is not practicable in every sphere of law. A law in the sense of the Act of the legislature may be particular in the fullest sense of the word. A Divorce Act is law even if it does not apply to all persons. Law, in the sense of the legal system, can be particular. The requirement that law should be general is extremely difficult to maintain. There are degrees of generality. The question whether a contract can create law for the parties has peculiar urgency for the international lawyer. In his view, treaties are a source of international law. They are so only if law need not be general as normally treaties are binding only on those States which have ratified them. The international lawyer who declares that a bilateral treaty makes law for the parties is implicitly declaring that law need not be general.

Some particular precepts may concern especially important persons such as the king. Are we going to deny the name law to them? Consider an Abdication Act providing for the abdication of one monarch and accession of another. Such an Act has to be considered a part of law.

### (13) Promulgation — open declaration; to make known publicly

According to Austin, law is a command and that command has to be communicated to the people by whom it is meant to be obeyed or followed. This view of Austin is not tenable. Promulgation is usually resorted to but it is not essential for the validity of a rule of law. Up to 1870, laws in Japan were addressed only to the officials whose duty was to administer them and might be read by no one else. The Chinese maxim "let the people abide by, but not be apprised of the law" lends further support to the argument.

### (14) Law as Command

According to Austin, law is a command of the sovereign but all laws cannot be expressed in terms of a command. The greater part of a legal system consists of laws which neither command nor forbid things to be done. They empower people by certain means



to achieve certain results, e g , laws giving citizens the right to vote, laws conferring on leaseholders the right to buy the reversion, laws concerning the sale of property and the making of wills. The bulk of the law of contract and of property consists of power-conferring rights. To regard a law conferring a power on one person as in fact an indirect order to another is to distort its nature. The term "command" suggests the existence of a personal commander. In modern legal systems, it is impossible to identify any commander in this personal sense. This is especially so where sovereignty is divided as in federal States. Commands conjure up the picture of an order given by one particular commander on one particular occasion to one particular person. Laws differ as they can and do continue in existence long after the extinction of the actual law-giver. It might be contended that laws laid down by a former sovereign remain law only in so far as the present sovereign does not repeal them and allows them to remain in force. It cannot be said that what the sovereign permits, he impliedly or tacitly commands. In certain States, the law-making powers of the sovereign are limited by the Constitution which prevents the repeal by ordinary legislation of "entrenched" clauses. In such cases, no question arises of the present sovereign allowing or adopting such clauses. The notion of an implied or tacit command is suspect. An implied command is no command.

The bulk of English law has been created neither by ordinary legislation nor by delegated legislation, but by the decisions of the courts. To describe the judges as delegates is misleading. The fact that Parliament can always overrule any judicial decision of the courts does not entail that judicial law-making is of a delegated nature. This confuses subordinate with derivative powers.

### Sanction

Austin's definition of law may be true of a monarchical police State, but it cannot be applied to a modern democratic country whose machinery is employed for the service of the people. The sanction behind law is not the force of the State but the willingness of the people to obey the same. To define law in terms of sanction is like defining health in terms of hospital and diseases. Force can be used only against a few rebels and not against the

whole society. If law is opposed by all the people, no force on earth can enforce the same.

Sanction is not an essential element of law. If we apply this fact to every kind of law, we are liable to arrive at absurd conclusions. It is true that there is such a thing as sanction in case of criminal law but no such sanction is to be found in case of civil law. If we accept Austin's definition, the whole of civil law will have to be excluded from the scope of positive law.

The writers of historical, sociological and philosophical schools of law criticise the idea of sanction as advocated by Austin. They point out that although international law and conventions are not backed by any authority, yet they are obeyed like any other law of the State. To quote Miller. "The machinery of law may include sanction or artificial motive, but in all societies the laws imposed or recognised are enforced and obeyed without any artificial sanction because if men are to live, they must act in some way and in society it is generally found that the path of law is the path of least resistance." Paton writes: "It cannot be explained psychologically as to how laws are obeyed on account of the sanction. Sanction can be applied only if there are only a few to oppose the law. However, if everyone decides to challenge law, it is bound to fail in its objective and no sanction can enforce the same." Pollock observes: "Law is enforced on account of its validity. It does not become valid merely because it is enforced by the State."

#### *)Not applicable to International Law*

Austin's definition of law cannot be applied to international law. Although international law is not the command of any sovereign, yet it is considered to be law by all concerned. The view of Austin was that international law was positive morality and he described it as "law by analogy". Austin has been repudiated on this point.

#### *)Not applicable to Constitutional Law*

Austin's definition of law does not apply to constitutional law which cannot be called a command of any sovereign. As a matter of fact, the constitutional law of a country defines the powers of the various organs of the State. Nobody can be said

to command himself. Even if one makes a command to bind one's self, it cannot have much force. Constitutional law is regarded by all concerned and if the definition of Austin does not apply, that definition must be taken to be defective.

*Not applicable to Hindu Law etc.*

Austin's definition of law cannot be applied to Hindu law, Mohammedan law and the Canon law. These laws came into existence long before the State began to perform legislative functions. It might be contended by the supporters of the Austinian theory that "what the sovereign permits, he impliedly commands". However, Parker points out that what the sovereign can permit is merely their enforcement. The sovereign cannot create them. It is too much to maintain that the personal laws of the Hindus and Muslims have been created by the command of a sovereign.

*Disregard of ethical elements*

Austin's theory of law is defective in as much as it disregards that ethical element which is an essential constituent of a complete conception. Austin's theory is silent about the special relation between law and justice.

The main criticism of Salmond against Austin's theory of law is that it disregards the moral or ethical elements in law. The end of law is justice. Any definition of law without reference to justice is inadequate. Law is not right alone, or might alone, but the perfect union of the two. Law is justice speaking to men by the voice of the State. As Austin's theory excludes the ethical elements in law, it cannot be accepted as a complete definition of law.

The view of Salmond is that Austin's definition of law refers to "a law" and not "the law". The term "a law" is used in a concrete sense to denote statute, e.g., the law of contract etc. However, the term "the law" is used in an abstract sense to denote legal principles in general. Austin's definition refers to law only in the concrete sense and not in the abstract sense. A good definition of law must deal with both aspects of the law.

*Purpose of Law ignored*

Austin's theory of sovereignty ignores altogether the purpose of law and hence is one-sided and incomplete. Paton writes that

justice is the command of law and it is only fitting that an instrument should be defined by a delineation of the purpose which is its *raison d'être*. The view of Sir Henry Maine is that Austin's theory is founded on a mere artifice of speech and it assumes courts of justice to act in a way and from motives of which they are quite unconscious. The purpose of law should be included in the definition of law.

About Austin's view of law and sovereignty, Buckland writes: "This, at first sight, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law." As it is put, the statement is undoubtedly circular. Law is defined in terms of the sovereign and the sovereign is defined in terms of the law. However, Austin did not do so. He defined law in terms of the sovereign, but he defined the sovereign as the body that receives the habitual obedience of the bulk of a given society and that was obviously not circular. We should also not accuse Buckland of having misrepresented Austin because what he said was that superficially Austin's arguments looked circular. Buckland himself observed thus: "But this is not circular reasoning; it is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference."

### *Salmond on Austin's theory of law*

The view of Salmond is that Austin's theory of law is onesided and inadequate. It does not contain the whole truth. It eliminates all elements except that of force. By doing so, Austin has missed the ethical element in law or the idea of right or justice. It is not by accident that the expressions law and justice are regarded as synonymous and courts of law are described in popular parlance as courts of justice. Essentially, law is the declaration of a principle of justice. As Austin's theory of law does not take into consideration the purpose of law, it is not an adequate definition of law.

Salmond maintains that the Austinian theory not only misses the ethical aspect of law but overemphasises its imperative aspect. It is true that State enforcement is an essential ingredient in law but it is true only in the sense that law requires the coercive administration of justice by the State. It is not true in the sense

to command himself. Even if one makes a command to bind one's self, it cannot have much force. Constitutional law is regarded law by all concerned and if the definition of Austin does not apply, that definition must be taken to be defective.

*Not applicable to Hindu Law etc.*

Austin's definition of law cannot be applied to Hindu law, Mohammedan law and the Canon law. These laws came into existence long before the State began to perform legislative functions. It might be contended by the supporters of the Austinian theory that "what the sovereign permits, he impliedly commands". However, Parker points out that what the sovereign can permit is merely their enforcement. The sovereign cannot create them. It is too much to maintain that the personal laws of the Hindus and Muslims have been created by the command of a sovereign.

*Disregard of ethical elements*

Austin's theory of law is defective in as much as it disregards that ethical element which is an essential constituent of a complete conception. Austin's theory is silent about the special relation between law and justice.

The main criticism of Salmond against Austin's theory of law is that it disregards the moral or ethical elements in law. The end of law is justice. Any definition of law without reference to justice is inadequate. Law is not right alone, or might alone, but the perfect union of the two. Law is justice speaking to men by the voice of the State. As Austin's theory excludes the ethical elements in law, it cannot be accepted as a complete definition of law.

The view of Salmond is that Austin's definition of law refers to "a law" and not "the law". The term "a law" is used in a concrete sense to denote statute, e.g., the law of contract etc. However, the term "the law" is used in an abstract sense to denote legal principles in general. Austin's definition refers to law only in the concrete sense and not in the abstract sense. A good definition of law must deal with both aspects of the law.

*Purpose of Law ignored*

Austin's theory of sovereignty ignores altogether the purpose of law and hence is one-sided and incomplete. Paton writes that

justice is the command of law and it is only fitting that an instrument should be defined by a delineation of the purpose which is its *raison d'être*. The view of Sir Henry Maine is that Austin's theory is founded on a mere artifice of speech and it assumes courts of justice to act in a way and from motives of which they are quite unconscious. The purpose of law should be included in the definition of law.

About Austin's view of law and sovereignty, Buckland writes : "This, at first sight, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law." As it is put, the statement is undoubtedly circular. Law is defined in terms of the sovereign and the sovereign is defined in terms of the law. However, Austin did not do so. He defined law in terms of the sovereign, but he defined the sovereign as the body that receives the habitual obedience of the bulk of a given society and that was obviously not circular. We should also not accuse Buckland of having misrepresented Austin because what he said was that superficially Austin's arguments looked circular. Buckland himself observed thus : "But this is not circular reasoning ; it is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference."

### *Salmond on Austin's theory of law*

The view of Salmond is that Austin's theory of law is onesided and inadequate. It does not contain the whole truth. It eliminates all elements except that of force. By doing so, Austin has missed the ethical element in law or the idea of right or justice. It is not by accident that the expressions law and justice are regarded as synonymous and courts of law are described in popular parlance as courts of justice. Essentially, law is the declaration of a principle of justice. As Austin's theory of law does not take into consideration the purpose of law, it is not an adequate definition of law.

Salmond maintains that the Austinian theory not only misses the ethical aspect of law but overemphasises its imperative aspect. It is true that State enforcement is an essential ingredient in law but it is true only in the sense that law requires the coercive administration of justice by the State. It is not true in the sense

that every legal principle is the command enforced by a sanction. What is true is that while some principles of law are imperative principles, others are not.

Salmond contends that all laws are not commands. A lot of modern law is of a purely permissive character and confers privileges. When law permits a man to make a will, it does not command him to do so. The same is true of the rules relating to judicial procedure and interpretation of statutes. As a matter of fact, Austin himself found three exceptional cases in civil law where there was no command. To quote Salmond: "All legal principles are not commands of the State and those which are such commands are at the same time and in their essential nature, something more, of which the imperative theory takes no account."

Salmond finds another defect in Austin's definition of law. Austin's definition attempts to answer the question "What is a law?" but the true enquiry should be "What is law?" Law in the abstract sense is more comprehensive in its signification than law in the concrete sense. To quote Salmond: "The central idea of juridical theory is not *lex* but *jus*, in *gestez* and *recht*." By trying to define "a law" Austinian theory is led to the wrong conclusion that statute law is typical of all law and the form to which all law reduces itself in root analysis. The error lies in the wrong method of approach by Austin.

It is sometimes said that the chief defect in Austin's definition lies in the method adopted by Austin to arrive at the definition. Austin says that positive law is the "aggregate of the rules established by political superiors". Salmond does not agree with this view. To quote him: "All law is not produced by laws and all laws do not produce law." Law represents the whole body of rules recognised and applied by the courts. A law usually arises from the exercise of legislative authority of the State and is one of the sources of law in the abstract sense. Judicial precedents and customs are also sources of law and they produce case law and customary law. Although they are not enacted by any law, they are also applied by courts. Hence it is correct to say that "all law is not produced by law".

Salmond further says that "although laws commonly produce law, that is not invariably the case." Every Act of Parliament

is called a law but not all Acts of Parliament formulate rules of law. Before the system of judicial divorce was introduced in England by the Matrimonial Causes Act of 1857, a divorce could be got by means of a private Act of Parliament. Although the private Act was passed by Parliament by which the parties ceased to be husband and wife, no legal principle was created. That is why Salmond observed: "All law is not produced by laws and all laws do not produce law."

### *Merit of the Theory*

In spite of the criticism of Austin's theory of law, it cannot be denied that Austin rendered a great service by giving a clear and simple definition of law. Before him, there was a lot of confusion about the nature of law. By separating law completely from morality, Austin tried to avoid a lot of confusion. His theory of law contains an important element of universal and paramount truth. The law is created and enforced by the State. To quote J. C. Gray: "If Austin went too far in considering the law as always proceeding from the State, he conferred a great benefit on jurisprudence by bringing out clearly that law is at the mercy of the State." Salmond observes thus about Austin's theory of law: "It contains an important element of truth. It rightly recognises the essential fact that civil law is the product of the State and depends for its existence on the physical force of the State exercised through the agency of judicial tribunals. Where there is no State which governs a community by the use of physical force, there can be no such thing as civil law. It is only if and so far as any rules are recognised by the State in the exercise of this function that these rules possess the essential nature of civil law."

### **Salmond's Definition of Law**

According to Salmond: "Law may be defined as the body of principles recognised and applied by the State in the administration of justice." In other words, law consists of the rules recognised and acted upon by the courts of justice. Law may arise out of popular practice. Its legal character becomes patent when it is recognised and applied by a court of law in the administration of justice. Courts may misconstrue a statute or reject a custom. It is only the ruling of the court that has



binding force as law. If the highest court of the State wilfully misconstrues an Act of the Legislature, the interpretation so placed on that Act would *ipso facto* be law since *ex hypothesi* there is no higher judicial tribunal with jurisdiction and authority to decide to the contrary. The true test of law is enforceability in the courts of law.

Salmond has defined law in the abstract sense. His definition brings out also the ethical purpose of law. Law is an instrument of justice and that idea is prominently brought out in the definition of Salmond.

### Criticism

Vinogradoff has criticised Salmond's definition of law. According to him: "The direct purpose for which judges act is, after all, the application of law. A definition of law starting from their action would therefore be somewhat like the definition of a motorcar as a vehicle drawn by a chauffeur." Vinogradoff asks: "What should we think of a definition of medicine as a drug prescribed by a doctor?"

The administration of justice by a court means and involves the enforcement of law. When the administration of justice is to be defined as the application of law, no useful purpose would be served by defining law as what is applied in the administration of justice. To seek for a definition of law in the function of the court is to beg the very question which we have set out to answer. The definition of Salmond suffers from the vice of running in a circle.

Vinogradoff points out that the definition of law by reference to the administration of justice inverts the logical order of ideas. The formulation of law is a necessary precedent to the administration of justice. Law has to be formulated before it can be applied by a court of justice. The definition of Salmond is defective as it assumes that law is logically subsequent to the administration of justice. A rule is law because courts of justice would apply and enforce it while deciding cases. The vice of hypallage vitiates the definition of law by Salmond.

The view of Sir John Salmond is that the above objection is based on a misapprehension of the essential nature of the adminis-

tration of justice which is primarily the maintenance of right and justice. For that purpose, law is not necessary. Justice may be dispensed by judges who are allowed an unfettered discretion to decide cases according to equity, good conscience and natural justice. Such was the case in early times when a court of justice was not a court of law also. In the administration of justice, the corpus of law is built up and legal principles are collected from different sources. A legal system consisting of inflexible and pre-established principles is not a condition precedent but a product of the administration of justice. Law consists of those authoritative principles. Law is the instrument for the attainment of the ends of justice. It is in the fitness of things that the instrument is defined with reference to its end.

The definition of law adopted by Salmond destroys the very nature of the thing which it seeks to define. If a statute is not law because it may be misinterpreted, it is also not a judicial decision because it may be overruled. Justice Cardozo writes: "In that view even past decisions are not law. The courts may overrule them. Law never is, but is always about to be. It is realised only when embodied in a judgment, and in being realised, expires. There are no such things as rules and principles; there are only isolated dooms." (*The Nature of the Judicial Process*).

Another criticism of Salmond's definition of law is that he uses the term "the body of principles" in his definition. The term implies more of abstract, basic principles and fails to give due importance to concrete law, the law made up of statutes. In reality, civil law deals more with the concrete than the abstract. Salmond's definition fails to bring out that aspect.

Another criticism is that Salmond defines law in terms of justice. It follows from this that an unjust law cannot exist because it would amount to a fatal self-contradiction, as for instance the term "square-circle". It is pointed out that law does not cease to be law merely because it is unjust.

Another criticism of Salmond's definition is that the goal of justice is not the only purpose of law. Law serves many ends which may vary from time to time and place to place. Today, the ends which seem to be universally accepted are those of securing order in society, the greatest happiness of the largest number

and the reconciliation of the will of one with the liberty of another. Goodhart criticises Salmond's definition of law in these words: "Admirable as this definition may be as an ideal, it can hardly be expected as a practical solution of the question. The obvious answer to it is that it does not include laws which are unjust. Such rules nevertheless are laws. A definition of the whole must include all the parts. A minor criticism of this definition is that certain laws are recognized and enforced solely by administrative officers and the courts of law are not permitted to take cognizance of them. This has always been true on the Continent and can even be found in exceptional cases in England, as, for example, in the case of the exclusion of aliens. As Professor Pound has pointed out, administrative law has been developing rapidly in the United States and many questions are no longer justiciable in the courts of law. Is not the primary purpose of the law order rather than justice? Law and order are two terms which cannot come into conflict. Law and justice are terms which, unfortunately, are frequently contrasted."

Paton writes: "The purpose of law is essential to an understanding of its real nature; but the pursuit of justice is not the only purpose of law: the law of any period serves many ends and those ends will vary as the decades roll by. To seek for one term which may be placed in a definition as the only purpose of law leads to dogmatism. The end that seems most nearly universal is that of securing order, but this alone is not an adequate description; indeed, Kelsen regards it as a pleonasm, since law itself is the order of which we speak." Again, "we must distinguish clearly between justice and law, for each is a different conception. Law is that which is actually in force, whether it be evil or good. Justice is an ideal founded in the moral nature of man. The conception of justice may develop, as men's understanding develops, but justice is not limited by what happens in the actual world of fact. It is wrong, however, to regard law and justice as entirely unrelated. Justice acts within the law as well as providing an external test by which the law may be judged, e.g., justice emphasizes good faith and this conception has greatly influenced the development of legal system".

Pound says that Salmond's definition of law reduces law to a mere collection of isolated doctrines. The view of Jerome Frank

is that Salmond's definition is narrow and ignores administrative law.

Salmond puts emphasis on the purpose of law in his definition. Undoubtedly, the end of law is justice and law can appropriately be described in terms of justice. Gray writes: "The law of a great nation means the opinions of half a dozen old gentlemen, for if those half a dozen old gentlemen form the highest tribunal of a country, then no rule or principle which they refuse to follow is law in that country." (*The Nature and the Sources of the Law*, p. 82).

Like Austin, Salmond has defined law with reference to its source. He gives prominence to the courts instead of the sovereign or the legislature. Austin's definition has two principal defects. It does not associate law with its essential elements of right and justice. It fails to include rules which are not reducible to the form of commands. The definition of Salmond avoids those defects. It satisfies the requirements of logic. All laws are recognised by the courts and no rules are recognised and administered by the courts which are not rules of law.

### Legal Sanctions

The term "sanction" is derived from Roman law. *Sanctio* was originally that part of a statute which established a penalty or made other provisions for its enforcement. In the ordinary sense, the term sanction means mere penalty. It can also be some motivating force or encouragement for the purpose of better performance and execution of laws.

According to Salmond, a sanction is the instrument of coercion by which any system of imperative law is enforced. Physical force is the sanction applied by the State in the administration of justice. Censure, ridicule and contempt are the sanctions by which society enforces the rules of positive morality. War is the ultimate sanction for maintaining the law of nations.

Writers like Hobbes, Locke and Bentham include even the element of reward, benefit or pleasure in sanction because a reward offered for an act or forbearance induces a party to act or forbear and thus has a similar effect to sanction. The same view is supported by Jethrow Brown. Austin writes: "It is only by conditional evil that duties are sanctioned or enforced. It is the

power and the purpose of inflicting eventual evil and not the power and purpose of imparting eventual good which gives to the expression of a wish the name of a command. Prof Hibbert puts forward three objections to bracketing reward with sanction. The parties who do not earn the reward do not suffer any evil. No one is under a duty to earn a reward. If the term sanction is applied to rewards because they induce acts or forbearance, then the term should be applied to inducements of all kinds.

Pollork gives a very clear picture of the nature of sanction. According to him, in a modern State, the sanction of law means, both for lawful men and for evildoers, something much more definite. It means nothing less than the constant willingness and readiness of the State to use its power in causing justice to be done.

A sanction can be distinguished from punishment. Sanction is the genus of which punishment is the species. Sanction consists in the application of the physical force of the State for the enforcement of law. Punishment or penalty is an evil inflicted upon a wrongdoer. Punishments are pre-eminently the sanction of criminal law. They are ultimate sanctions. The term sanction is wider than punishment. It is one of the kinds of sanction. There are sanctions *other than* punishment. Civil sanctions have restitution or compensation as their object.

Sanction also differs from liability. Sanction is a conditional evil to be incurred by disobedience to law. Law is "the State of exposedness to the sanctions of the law".

Professor Hibbert has given an exhaustive classification of sanctions in England. A legal sanction may be civil or criminal. Criminal sanction may be capital punishment, imprisonment, corporal punishment, fine, deprivation of civil and political rights, forfeiture of property and deportation. Civil sanctions are damages, costs, restitution of property, specific performance and injunction. Injunctions can be prohibitory and mandatory. Damages can be liquidated and unliquidated damages. Liquidated damages are nominal, ordinary and special.

Sanction of nullity is a civil sanction which regulates the rules of evidence and procedure. It consists in a refusal by the court to help a party who has disregarded the law. A document

which requires to be registered will not be given effect if it is not so registered.

There is a controversy on the point whether sanction is an essential element of law or not. The majority of the jurists who follow Austin are of the view that sanction is an indispensable element of law. Hobbes writes: "It is men and arms that made the force and power of the laws." The view of Ihering is that law without sanction is like fire that does not burn and light that does not shine.

Pollock writes: "The appointed consequences of disobedience, sanction of law as they are commonly called, seem to be not only a normal element of civilised law, but a necessary constituent." Salmond says: "The civil law has its sole source, not in consent, or in custom, or in reason, but in the will and the power of him who in a commonwealth beareth not the sword in vain."

Those who do not subscribe to the above view point out that though sanction is commonly present in every law, it is not absolutely necessary to constitute a legal rule. It may be a good instrument to enforce law but it cannot be called the essence of legal relations. Law is powerless to provide complete sanction to guarantee against any injury. The presence of sanction shows the undeveloped stage of civilisation. As society develops, it goes on losing its importance by and by. Force is not the only thing which induces men to obey law. That can be due to indolence, deference or respect for law, sympathy or the emotion to subordinate individual will to the general will, reason which guides thoughtful minds to obey law and fear which puts a restraint on criminal nature. Convenience, habitual observance, inclination, sense of duty and social necessity provide forceful incentives for obeying the law. If the whole society decides to disobey the law, no amount of force can enforce it. Miller writes: "The machinery of law may include a sanction or artificial motive but in all societies the laws imposed or recognised are enforced and obeyed without an artificial sanction because if men are to live they must act in some way, and in society it is generally found that the path of law is the path of least resistance."

### **Territorial Nature of Law**

The enforcement of law is territorial in the same way as a

State is territorial. The territoriality of law flows from the political divisions of the world. As a general rule, no State allows other States to exercise powers of government within it. The enforcement of law is confined to the territorial boundaries of the State enforcing it. A person who commits a crime or a tort in State *A* and who then removes himself and his property to State *B*, cannot be reached by the authorities of State *A*. He has certainly violated the law of State *A* but the enforcement of that law is impossible so long as the offender is outside the territory of that State. In the case of crimes, the remedy lies in the practice of extradition. States conclude treaties with each other by which each agrees to surrender to the other State persons found in its territory who are wanted for crimes committed in the territory of the other party to the treaty. Extradition is not practised in civil cases. However, every State gives a remedy in its own courts for civil wrongs wherever they may be committed.

The proposition that a system of law belongs to a defined territory means that it applies to all persons, things, acts and events within that territory. It does not apply to persons, things, acts or events elsewhere. The part of English law which is emphatically territorial is criminal law. With a few exceptions, it applies to all offences committed in England and not to offences committed elsewhere. The land law of English courts applies only to land situated in England. It is not a universal non-territorial doctrine applied to land situated elsewhere. The law of marriage, divorce, succession and domestic relations applies only to those persons who by residence, domicile or otherwise are sufficiently connected with the territory of England.

There are many cases in which the above principle does not apply. States like Turkey apply their criminal law even to foreigners in respect of crimes committed abroad if the victims are their subjects and the foreigner concerned ventures or comes within their territory. The rule that title to land is governed by the *lex citus* is not invariable. An English court of equity will apply certain equitable rules even to lands situated abroad. In the case of *Penn v. Lord Baltimore*, the English Court of Equity acted on the maxim that equity acts *in personam* and took cognizance of the case although the transaction had taken place beyond its

jurisdiction Italian law rejects the *lex citus* in favour of the law of the owner's nationality in cases of succession on death.

The English law of torts knows comparatively little of any territorial limitation If action for damages for negligence or other wrongful injury committed abroad is brought in an English court, it will in general be determined in accordance with English law and not otherwise. The law of procedure is not territorial in any respect. The English law of procedure is the law of English courts rather than the law of England. It is the same for all litigants who come before those courts, whatever may be the territorial connections of the litigants or their cause of action.

A law is said to have extra-territorial operation when it operates also outside the limits of the territory within which it is enacted. By virtue of the Indian Penal Code and the Code of Criminal Procedure, Indian courts are empowered to try offences committed outside India on land and on the high seas The latter is known as admiralty jurisdiction which is based on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she flies.

In *Savarkar's* case, the accused Savarkar was in the custody of police officers who had to bring him from London to Bombay. On the way, he escaped at Marseilles (in France). He was rearrested there and brought to Bombay. He was committed for trial by the special magistrate at Nasik. It was held by the High Court that the trial and committal of Savarkar were valid.

In the case of *Mobarik Ali Ahmed v. State of Bombay*, the appellant, though at Karachi, was making representations to the complainant through letters, telegrams and telephone talks, sometimes directly to the complainant and sometimes through a commission agent that he had ready stock of rice, that he had reserved shipping space and on receipt of money, he would be in a position to ship the rice forthwith Those representations were made to the complainant at Bombay, notwithstanding that the appellant was making the representations from Karachi. It was as a result of those representations that the complainant parted with his money to the tune of about Rs. 5 1/2 lakhs on three different dates. It was found that the representations were made without being supported by requisite facts and with an initial dishonest intention.



It was held by the Supreme Court of India that all the ingredients necessary for finding the offence of cheating under Section 420 of the Indian Penal Code read with Section 415 occurred at Bombay. In that sense, the entire offence was committed at Bombay and not merely the consequence of it, viz, delivery of money which was one of the ingredients of the offence. Though the appellant was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code. The fastening of criminal liability on the appellant who was a foreigner, was not to give any extra-territorial operation to the law in as much as the exercise of criminal jurisdiction in the case where all the ingredients of the offence had occurred within the territory of India (AIR 1957 SC 857).

The conclusion of Salmond is that as territoriality is not a logically necessary part of the idea of law, a system of law is conceivable the application of which is limited and determined not by reference to territorial considerations, but by reference to the personal qualifications of the individuals over whom jurisdiction is exercised: qualifications such as nationality, race or religion. (*Jurisprudence*, p. 82).

### **Purpose and Function of Law**

There has been a lot of speculation about the purpose and function of law. There is nothing dogmatic about it. Law changes from time to time and from country to country. Law is not static. It must change with changes in society. That is the reason why there is no unanimity with regard to the purpose and function of law.

According to one school of thought, the object of law is to maintain law and order in the country. It has to perform police functions. Plato says: "Mankind must either give themselves a law and regulate their lives by it or live no better than the wildest of the wild beasts." According to Hobbes: "Law was brought into the world for nothing else but to limit natural liberty of particular men in such a manner as they might not hurt but assist one another and join together against a common enemy." Locke says that "the end of law is not to abolish or restrain but to preserve or enlarge freedom". According to Kant: "The aim of law is freedom and the fundamental process of law is the adjust-

ment of one's freedom to that of every other member of the community."

According to Bentham: "Of the substantive branch of the law, the only defensible object or end in view is the maximisation of the happiness of the greatest number of the members of the community in question."

Holland says: "Law is something more than police. Its ultimate object is no doubt nothing less than the highest well-being of society; and the State from which law derives its force, is something more than an institution for the protection of rights."

Roscoe Pound says that there are four purposes of law. The first purpose of law is to maintain law and order within a given society and that has to be done at any cost. The second purpose of law is to maintain the *status quo* in society. The third purpose is to enable individuals to have the maximum of freedom to assert themselves. The fourth purpose of law is the maximum satisfaction of the needs of the people.

According to Justice Holmes: "The object of law is not the punishment of sins but to prevent certain external results"

According to Savigny, law is "the rule which determines the sphere within which the existence and activity of each individual may obtain secure and free play"

A school of jurists of which Krause and Ahrens are representatives demand that law should be conceived of as harmonising the conditions under which human race accomplishes its destiny by realising the highest good of which he is capable. The pursuit of this highest good of the individual and of society needs a controlling power, which is law, and an organisation for the application of its control, which is the State.

The Hindu view regarding the purpose of law is that it should aim at the welfare of the people in this world and also from salvation after death. According to the Mohammedan law, the purpose of law is the discipline of the soul, the improvement of morals and the preservation of life, property and reputation. Sir Abdur Rahim writes: "The end of law is to promote the welfare of man both individually and socially, not merely in respect of life on this earth but also of future life."

According to Salmond, the object of law is justice. To Salmond, law is those principles which are applied by the State in the administration of justice.

Justice can be used in a wider or a more restricted sense. In the wider sense, justice appears to be roughly synonymous with morality. In the narrower sense, as in the expressions "courts of justice", "natural justice" and "denial of justice", the term refers to but one area of morality.

Justice operates at two different levels, distributive justice and corrective justice. Distributive justice works to ensure a fair division of social benefits and burdens among the members of a community. Distributive justice serves to secure a balance or equilibrium among the members of society. That balance can be upset as when *A* wrongfully seizes *B*'s property. At that point, corrective justice will move in to correct the disequilibrium by compelling *A* to restore the property to *B*. The function of the courts is to apply justice in its corrective sense. In a fair legal system, there are procedural or other rules which give each party an equal opportunity of presenting his case and calling evidence and to prevent judicial prejudice in favour of either.

Fair and equal dispensation of justice demands more than equality between the parties to individual law suits. It requires that all be equal before the law. Legal rights which each person has should be given equal protection by the courts. In each case, both the plaintiff and defendant should get an equal "crack of the whip". Judges should mete out justice without fear or favour, without distinction between high and low, rich and poor and so forth. Like cases should be treated alike not only as regards the hearing but also in respect of the finding. Major discrepancies in sentencing mean in fact inequality before the law.

According to Roscoe Pound, law is a species of social engineering whose function is to maximise the fulfilment of the interests of the community and its members and to promote the smooth running of the machinery of society. Bodily security, property, reputation and freedom of speech are all interests in this sense. All of these interests do not necessarily receive recognition and protection by law. The right to privacy is not fully recognised

by English law. The reconciliation of conflicts between competing interests is in a broad sense part of the problem of justice

Justice is not the only possible or desirable goal of law. The notion of law represents a basic conflict between two different needs, the need for uniformity and the need for flexibility. Uniformity is needed partly to provide certainty and predictability. Where rules of law are fixed and generalised, the citizen can plan his activities with a measure of certainty and predict the legal consequences of his behaviour. In some areas of law such as contract and property, this need may outweigh all others and fixed rules may be preferable to rules that are fairer but less certain. Another benefit is stability and security which the social order derives from uniform, unchanging and certain rules of law.

There is also a need for a certain degree of flexibility. The existing rules may not provide for a borderline case. As a matter of fact, no rule can make provision for every possible case. Some measure of discretion is necessary. Flexibility is necessary to enable law to adapt itself to social change. If law is unalterable, the necessary changes will come by revolution, violence and upheavals. Law that is capable of adaptation, whether by legislation or judicial development, allows for peaceful change from time to time.

In conclusion, it can be said that the function of law is to achieve stability and peaceful change in society.

### **Uses or Advantages of Law**

(1) There are many advantages of the fixed principles of law. They provide *uniformity and certainty* to the administration of justice. The same law has to be applied in all cases. There can be no distinction between one case and another case if the facts are the same. Law is no respecter of personality. Not only this, law is also certain. The legal system of a country is put down in black and white and it is possible for all the people to know the law of the land. The uniformity and certainty of law add to the convenience and happiness of the people. The rules of the road make it possible for millions of people to drive with relative safety. Without these rules, it would have been impossible for them to attend their offices daily in time. Society is becoming more and more complicated everyday and without the

existence of an elaborate system of laws, it is not possible to live in safety.

(2) The existence of fixed principles of law *avoids the dangers of arbitrary, biased and dishonest decisions*. Law is certain and known. Therefore, a departure from a rule of law by a judge is visible to all. It is not enough that justice should be done, but it is also necessary that it should be seen to be done. If the administration of justice is left completely to the individual discretion of a judge, improper motives and dishonest opinions could affect the distribution of justice. Salmond writes: "It is to its impartiality, far more than its wisdom (for this latter virtue it too often lacks) that are due the influence and reputation which the law has possessed at all times; wise or foolish, it is the same for all." Locke writes: "The legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and to decide the rights of the subjects by promulgating standing law and known, authorised judges." According to Cicero: "We are the slaves of the law that we may be free."

(3) The fixed principles of law protect the administration of justice from the errors of individual judgment. In most cases, the law on the subject is clear and judges are not expected to twist the same. They are not expected to substitute their own opinion for the law of the country. Experience shows that people have lived happier lives when they are ruled by the fixed principles of law than when there are no laws as such. There is greater mischief if judges are allowed to decide every case according to what seems to them to be the best. Aristotle writes: "To seek to be wiser than the law is the very thing which is by good laws forbidden." Salmond observes: "The establishment of the law is the substitution of the opinion and conscience of the community at large for those of the individuals to whom the judicial functions are entrusted. The law is not always wise, but on the whole and in the long run, it is wiser than those who administer it."

(4) Another advantage of law is that it is *more reliable* than individual judgment. Human mind is fallible and judges are no exception. The wisdom of the legislature which represents the

wisdom of the people is a safer and more reliable means of protection than the momentary fancy of the individual judge.

### Disadvantages of Law

(1) Law has not only advantages but also disadvantages. One disadvantage is the *rigidity of law*. An ideal legal system keeps on changing according to the changing needs of the people. Law must adjust itself to the needs of the people and cannot isolate itself from them. However, law is not usually changed to adjust itself to the needs of the people. There is always a gap between the advancement of the people and the legal system of the country. The lack of flexibility in law results in hardship and injustice in several cases.

(2) Another disadvantage of law is its *conservative nature*. Both the lawyers and judges favour the continuation of the existing law. The result is that very often law is static. This is not desirable for a progressive society.

(3) Another defect of law is *formalism*. More emphasis is put on the form of law than its substance. A lot of time is wasted in raising technical objections of law which have nothing to do with the merits of the case in dispute. While insisting on the formalities of law, injustice may be done in very many cases. While an innocent person may suffer, the clever and the crooked may profit thereby.

(4) Another defect of law is its undue and needless *complexity*. It is true that every effort is made to make law as simple as possible but it is not possible to make every law simple. That is due to the complex nature of modern society. Lawyers also insist on drawing fine distinctions on the various points of law. There is a lot of hair-splitting. This does not bring justice nearer but merely helps the clever and the crooked. It is true that some of the defects can be removed by codification but the difficulty with codification is that within a few years, so much of case law comes into existence that the real law of the country cannot be understood by a reference to the code alone. Law must change with the changing condition but codes cannot be changed frequently:

The conclusion of Salmond is that if the benefits of law are great, the evils of too much law are also not small.

## Questions of Law and Fact

It is commonly said that all questions which arise for consideration and determination in a court of justice are of two kinds. They are either questions of law or questions of fact. In a sense, this is true but the matter has to be considered in detail because both the terms questions of law and questions of fact are ambiguous and possess more than one meaning.

### *Questions of Law*

According to Salmond, the term question of law is used in *three* distinct, though related, *senses*.

(1) In the *first* place, it means a question which the court is bound to answer in accordance with a rule of law which has already been authoritatively answered by the court. All other questions are questions of fact. Every question which has not been determined before and authoritatively answered by law is a question of fact. Whether a contractor has been guilty of unreasonable delay in building a house is a question of fact as the law does not contain any rule for its determination. Whether the holder of a bill of exchange has been guilty of unreasonable delay in giving notice of dishonour is a question of law to be determined in accordance with certain fixed principles laid down in the Bills of Exchange Act. The question whether a child accused of crime has sufficient mental capacity to be criminally responsible for his acts is one of fact if the accused is over the age of 10 years in England and 7 years in India. It is a question of law if he is under that age.

(2) In the *second* sense, a question of law is a question as to what the law is. An appeal on a question of law means an appeal in which the question for decision is what the true rule of law is on a certain matter. Questions of law in this sense arise out of the uncertainty of law. If the whole law could be definitely ascertained, there would be no question of law in this sense. When a question first arises in a court of justice as to the meaning of an ambiguous statutory provision, the question is one of law in the second sense. It is a question as to what the law is. It is not a question of law in the first sense but a question of fact. The business of the court is to determine what, in its own judgment and in fact, is the true meaning of the words used by

the legislature. An authoritative answer to the question becomes a judicial precedent which is law for all other cases in which the same statutory provision is in question. The judicial interpretation of a statute represents a progressive transformation of the various questions of fact as to the meaning of that statute into questions of law to be answered in conformity with the decided cases.

(3) As regards the *third* sense in which the term questions of law is used, there is a general rule that questions of law are for the judges and questions of fact are for the jury to decide. It is true that questions of law are never referred to the jury, but questions of fact can be referred to a judge. The interpretation of a particular document is a question of fact but very often it is done by the judge himself. The question of reasonable and probable cause for prosecution in a suit for malicious prosecution is decided by a judge although it is a question of fact. Paton points out that although a judge lays down the law and the jury applies it to facts and arrives at a conclusion, that is a mixture of law and fact and not fact alone.

### *Questions of Fact*

The term question of fact has more than one meaning. In a general sense, it includes all questions which are not questions of law. Everything is a matter of fact which is not a matter of law. According to Salmond, a question of fact means either any question which is not pre-determined by a rule of law, or any question except the question as to what the law is or any question which is to be answered by the jury. In a narrower sense, a question of fact is opposed to a question of judicial discretion which includes questions as to what is right, just, equitable or reasonable. Evidence can be led to prove or disprove a question of fact. It can be proved by evidence whether a particular person lives at a particular place or not and it is a question of fact. However, it is a question of law to decide how much punishment should be inflicted for any particular offence. It is a question of fact whether the offence of adultery has been committed or not but it is a question of law what punishment should be given to the adulterer.

A question of fact is a matter of fact as opposed to a matter of opinion. Evidence is given to find out the true facts of the



case. It can also be proved by means of demonstrations. However, a question of opinion cannot be proved by demonstration or by evidence.

Regarding the distinction between questions of law and fact, Paton observes: "However difficult it may be to define the exact difference between law and fact, the distinction itself is fundamental for any legal system. Law consists of abstract rules which attempt to reduce to order the teeming facts of life. Facts are the raw material on the basis of which the law creates certain rights and duties."

According to Salmond, all matters and questions which come before a court of justice are of three kinds viz., matters and questions of law, matters and questions of judicial discretion and matters and questions of fact. In the first case, it is the duty of the court to ascertain the law and decide the case accordingly. In the second case, the court can exercise its own judgment and decide the dispute according to what it considers to be right, just, equitable or reasonable. In the third case, it is the duty of the court to weigh the evidence and then come to its conclusion. As the legal system grows, there is a tendency to transform questions of fact and questions of judicial discretion into those of questions of law. As case law increases and legislative activity grows, the scope for the moral judgment of the court becomes narrower. Even in questions of pure fact, there are already pre-determined and authoritative answers.

Parker writes that actual cases may involve questions of law, fact and discretion at the same time. Whether a company should be wound up involves the question of fact as to what was done when it was as alleged created, the question of law whether that was sufficient to create a company, question of fact as to its present assets and liabilities and the question of discretion whether in view of the circumstances, it is just and equitable that it should be wound up.

### **Questions of Fact and Discretion**

Questions of fact are questions of what actually is and questions of discretion are questions of right and of what ought to be. In questions of fact, the court tries to find out the truth. In questions of discretion, the court decides what is just.

Questions of fact have to be proved by evidence and demonstration but questions of discretion are subjects of reasoning and argument. It is a question of fact whether a particular person has committed a crime or not and this can be proved or demonstrated. However, it is a question of discretion for the court to decide what punishment should be given to a person who has been found guilty of a particular offence. Likewise, it is a question of fact whether a valid contract subsists between the parties or not and whether a breach of the contract has taken place or not. It is a question of discretion how much damages are to be awarded or whether the specific performance of the contract can be enforced.

### **Mixed Questions of Law and Fact**

Experience shows that in actual practice, questions of law and fact are mixed. In the same case, the court has to decide questions of law and fact. If there is a dispute whether a partnership exists among certain parties or not, it is a question of fact as to what is the basic relationship between the parties. It is a question of law whether the basic relationship between the parties constitutes a partnership in the eyes of law or not. Thus we have a mixed question of law and fact. Very often, in criminal cases questions of fact are decided by the members of the jury and questions of law are decided by the judge and both of them are involved in the same case.

### **Transformation of questions of Fact into Law**

The existence and development of a legal system represents the transformation of questions of fact and judicial discretion into questions of law. As more and more cases are decided, identical decisions are given by the judges in those cases which have similar facts. Old case law is quoted in fresh cases. If the facts of the two cases are identical, the discretion of the judge disappears and he is bound to give his decision according to the precedent on the subject. To a lesser extent, even questions of fact are converted into questions of law. If similar facts are to be found in two cases, the decision arrived at in the previous case is also the conclusion arrived at in the next case.

### **Discordance between Law and Fact**

According to Salmond: "The law is the theory of things as received and acted upon within the courts of justice and this

theory may or may not conform to the reality of things outside. The eye of law does not infallibly see things as they are." This discordance between law and fact generally arises in two ways: by the establishment of legal presumptions and by the device of legal fictions.

### Legal Presumptions

A legal presumption is a rule of law by which courts and judges draw a particular inference from particular facts or from particular evidence unless and until the truth of that inference is disproved. One fact is recognised by law as sufficient proof of another fact, whether it is in truth sufficient for the purpose or not. A notification in the official gazette is presumed by law to have been duly signed by the person by whom it is purported to have been signed. In fact, the person concerned may have signed or may not have signed. However, the fact of notification is considered by law to be sufficient proof of the fact of the signature.

Presumptions are of two kinds: presumptions of law and presumptions of fact. Presumptions of law can be further subdivided into two parts: conclusive and rebuttable presumptions. A conclusive presumption is one which constrains the courts to infer the existence of one fact from the existence of another, even though that inference could be proved to be false. Law prohibits leading evidence to the contrary. If a child is born during the continuance of marriage and within 280 days after its dissolution that child is considered to be legitimate. Law does not allow any evidence to the contrary. A child under 7 years of age is conclusively presumed to be incapable of committing a crime and courts refuse to hear evidence to prove that the child realised the malicious or criminal nature or quality of the act. The Companies Act lays down that a Certificate issued by the Registrar of Companies that the requirements of the Act regarding registration have been fulfilled will be conclusive evidence that such requirements have been duly discharged. The certificate is final even if the signatures of some of the applicants were actually forged. Conclusive presumptions are called *presumptio juris et de jure*.

A rebuttable presumption is one where the law requires the

court to draw an inference even though there is no sufficient evidence to support it. However, if sufficient evidence is given to contradict a rebuttable presumption drawn by the court, the latter is bound to reject it. A negotiable instrument is presumed to be given for value unless the contrary is proved. A person who has not been heard of for 7 years or more by those who would naturally have heard of him if he had been alive is presumed to be dead. Any person accused of an offence is presumed to be innocent but the prosecution can prove that he has committed a particular offence.

### **Legal Fiction** (*Fictio Juris*)

According to Sir Henry Maine, a fiction means "any assumption which conceals or tends to conceal the fact that the rule of law had undergone any alteration, its letter remaining unchanged but its operation being modified". Salmond defines fiction as a device by which law deliberately departs from the truth of things whether there is any sufficient reason for the same or not. By means of a legal fiction, a child can be adopted from one family into another. A limited company is given a personality in the eye of law which is distinct from that of its members. Case law is based on a fiction that while enacting a particular rule of law, the legislature had a particular intention. If a particular term has been given a definite meaning by the courts of law and the same term is used by the legislature in another enactment or in the amendment of the law, it is presumed that the legislature has accepted the particular interpretation put on it by the courts of law of the country.

Fiction played an important part as a source of law in ancient times. There was a rule of procedure in Rome by which a non-Roman was allowed to make a false allegation that he was a Roman citizen and thereby *praetor urbanus* was able to try his case. The fiction of citizenship was adopted merely for the purpose of extending the Roman law to non-Romans. In the same way, courts of justice in England resorted to various kinds of fictions to add to their jurisdiction. The Court of Exchequer got jurisdiction over civil cases by means of a legal fiction that the plaintiff was the debtor of the King. The Court of King's Bench got jurisdiction over civil cases by the

fiction that the defendant was in custody for breach of peace. The fictions adopted by the courts actually did not exist. They were adopted as devices to add to the jurisdiction of the courts.

The view of Gray is that historical fictions were the means employed in the past for the development of law. The people at that time were conservative and it was not possible to change law directly and boldly. Therefore, various devices were employed to change the law in effect without changing its letter.

The old Roman law was laid down in XII Tables and additions to it were made by *Responsa Prudentium* or the judgments of the men learned in law. The interpretations put by them may not have been thought of by the compilers of the XII Tables but those were regarded as valid as a result of fiction. Law was actually altered although the fiction was maintained that it had not been changed.

In England also, the fiction of interpretation was employed for the growth of law. It was maintained that justice was administered according to the ancient and immemorial customs of the realm. Even when new cases came up for decision before courts of justice, the presumption was that those were to be disposed of according to the pre-existing rules of law although the courts did not hesitate to change the old law by giving judgments in new cases. Law continued to grow although the fiction was maintained that the ancient customs were being adhered to.

The view of Sir Henry Maine is that while in undeveloped countries, there was the necessity of fictions, that is not the case under modern conditions. The people are not conservative and law can be changed to meet the changing needs of the people. Fictions stand in the way of the codification of law. Legislative amendments should be preferred to legal fictions. Sir Frederick Pollock does not accept this view. According to him, the age of fictions is not over. Even now, we require the help of fictions. Even now, we require the fiction of the personality of a limited company as distinct from its members. The same is the case with the concept of constructive possession, constructive trust and constructive fund. A property may be in the actual possession of X but the same may be in the constructive possession of Y, the owner. No trust may have been created

but law may presume the same. The same is the case with fraud. By fiction, a Hindu child in the womb becomes entitled to family property. A gift can validly be made to a child in the womb. These fictions are given the title of dogmatic fictions by Gray. According to him: "Fictions of the dogmatic kind are compatible with the most refined and most highly developed systems of law."

### SUGGESTED READINGS

- |                           |  |
|---------------------------|--|
| Austin                    | : <i>The Province of Jurisprudence Determined.</i>   |
| Brown                     | . <i>The Austinian Theory of Law.</i>  |
| Bryce                     | : <i>Studies in History and Jurisprudence.</i>   |
| Buckland                  | : <i>Some Reflections on Jurisprudence.</i>  |
| Campbell                  | : <i>Austin's Jurisprudence.</i>   |
| Del Vecchio               | : <i>Formal Basis of Law.</i>  |
| Eastwood and<br>Keeton    | : <i>The Austinian Theories of Law and Sovereignty.</i>  |
| Fitzgerald,<br>P.J. (Ed.) | : <i>Salmond on Jurisprudence</i> , 12th edition, Sweet and Maxwell, London, 1979.               |
| Goodhart                  | : <i>Law and the Moral Law.</i>  |
| Gray                      | : <i>The Nature and Sources of Law</i>   |
| Hart, H.L.A.              | : <i>The Concept of Law.</i>   |
| Howe                      | : <i>Studies in the Civil Law.</i>   |
| Jennings (Ed.)            | : <i>Modern Theories of Law.</i>   |
| Kantorowicz               | : <i>The Definition of Law</i> (Ed. A.H. Campbell, 1958).  |
| Lightwood                 | : <i>Nature of Positive Law.</i>   |
| Robson                    | : <i>Justice and Administrative Law.</i>   |
| Sayre (Ed.)               | : <i>Interpretations of Modern Legal Philosophies</i> , Oxford University Press, New York, 1947. |

### III

## KINDS OF LAW

Sir John Salmond refers to eight kinds of law viz , imperative law, physical or scientific law, natural or moral law, conventional law, customary law, practical or technical law, international law and civil law.

### 1. Imperative law

According to Salmond : "Imperative law means a rule which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or any other form of compulsion." The chief advocate of imperative law is Austin who defines law as a command which obliges a person or persons to a course of conduct.

It is in the very nature of law to be imperative, otherwise it is not law but a rule which may or may not be obeyed. Imperative laws have been classified with reference to the authority from which they proceed. They are either divine or human. Divine laws consist of the commands imposed by God upon men and they are enforced by threats of punishment in this world or in the next world. Human law consists of imperative rules imposed upon men. Those are of three kinds : civil law, law of positive morality and law of nations or international law. Civil law consists of commands issued by the State to its subjects and enforced by its physical power. The law of positive morality consists of rules imposed by society upon its members and enforced by public censure or disapprobation. International law consists of rules imposed upon States by the society of States and enforced partly by international opinion and partly by the threat of war. The rules of international law are followed compulsorily and their breach is visited by punishment. Those may be war, the severance of diplomatic relations, enforcement of economic sanctions and condemnation by other States.

Salmond refers to two essential characteristics of imperative law. The first characteristic is that the command of the sovereign must be in the form of a general rule. It must not be a particular command addressed to a particular individual and not to others. Law must be general or it is not law at all. However, critics point out that complete generality is neither possible nor desirable. Sometimes, a law is applicable only to a particular class and not to the whole population. Moreover, the class may be limited to a single person and to a particular occasion. In spite of this, it cannot be denied that law must not make any distinction between individuals and should apply to all and not to some of them.

The second characteristic of imperative law is that it should be enforced by some authority. The observance of law must not depend upon the pleasure of the people. Law has to be enforced by the machinery of the State. The source of law is not consent, custom or reason but the strength of the State. The instrument of coercion by which law is enforced is called sanction. Sometimes, sanction is in the form of censure, ridicule or contempt and sometimes in the form of physical force. Sanction is not necessarily a punishment.

## **2 Physical or Scientific Laws**

According to Salmond: "Physical laws or the laws of science are expression of the uniformities of nature,—general principles expressing the regularity and harmony observable in the activities and operations of the universe." An example of physical laws is the law of tides. Physical laws are also called natural laws or laws of nature. There is uniformity and regularity in those laws. They are not the creation of men and cannot be changed by them. Human laws change from time to time and country to country but physical laws are invariable and immutable for ever.

Hooker writes: "His commanding those things to be which are and to be in such sort as they are, to keep that tenure and course which they do, importeth the establishment of nature's law. Since the time that God did first proclaim the edicts of His law upon it, heaven and earth have hearkened unto His voice and their labour hath been to do His will. See we not plainly that the obedience of creatures unto the law of nature is the stay of the whole world." Again, "of law there can be no less acknowledged



than that her seal is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage."

### 3. Natural Law or Moral Law

According to Salmond "By natural law or moral law is meant the principles of natural right and wrong — the principles of natural justice if we use the term justice in its widest sense to include all forms of rightful action." Natural law has been called divine law, the law of reason, the universal or common law and eternal law. It is called the command of God imposed upon men. It is established by that reason by which the world is governed. It is unwritten law and is not written on brazen tablets or pillars of stone but by the finger of nature in the hearts of men. It is universally obeyed in all places and by all people. It has existed from the beginning of the world and hence is called eternal. Divine law is also called natural law as its principles are supposed to have been laid down by God for the guidance of mankind. It is called rational law as it is supposed to be based on reason. It is called unwritten law as it is not to be found in the form of a code. All these names are not considered to be satisfactory but they point out the various characteristics of natural law. Natural law appeals to the reason of man. It is addressed to intelligent human beings. It does not possess physical compulsion. It embodies the principles of morality. Its principles are common to all the States. Natural law exists only in an ideal State and differs from positive law of a State.

From time to time, great writers have expressed their views on natural law or the law of nature. A reference in this connection may be made to the views of Aristotle, Cicero, Hobbes, Grotius, Pufendorf and Blackstone.

The law of nature has performed a very useful function. It was with the help of the law of nature that the *jus civile* or civil law of the Romans was transformed into *jus gentium* which later on became the basis of international law. Grotius based his principles of international law on the law of nature. An appeal was made to the law of nature to put a check on the arbitrary powers of the government and thereby to protect the liberties of the people. Judges also refer to the law of nature while interpreting the Constitution. This has been done in the United

States and the same is being done in India. The law of nature puts forward an ideal to be followed. This was actually done by writers like Hegel, Kant, Paine, Aristotle, Locke, Hume etc. During the Middle Ages, the law of nature was considered to be a higher law which was imposed on the people by the command of God. The law of nature sets up an ideal which the legal systems of the countries try to achieve.

Salmond points out that from a practical standpoint, natural law terminology might seem to offer advantages. First, as an antidote to legal rigidity, it could provide flexibility, allowing rules of law to be changed from what they are to what they ought to be, on the ground that the law always is what it ought to be. Secondly, the natural lawyer's terminology, it is claimed, would weaken the authority of unjust and immoral laws. Yet surely it may be better in such cases to highlight the conflict between law and morals and to stress that mere formal legality alone is no title to obedience. Adoption of natural law terminology could even weaken our capacity to criticise the law. It is easy to move from the premise that if a rule is unjust it is not law to the conclusion that if a rule is law it is just and this without realising that in the conclusion we may be determining in the first place that the rule is one of law by purely formal criteria. Moreover, natural law terminology tends to obscure the possibility of criticising law on other than purely moral grounds. For law must be evaluated by reference to its efficacy, general convenience, simplicity and many other factors, as well as by reference to the demands of justice and morality. To use natural law terminology to secure a conviction of those whose action at the time of the performance contravened no rules of positive law, by finding them guilty of violating the natural law, runs counter to the moral principle that no one should be held criminally liable for acts legally innocent at the time of their commission. Even in the trials of men like Eichmann this principle should not be lightly abandoned. (p. 25, *Salmond on Jurisprudence*, 12th edition, London, 1966).

The view of Dias and Hughes is that some of the contributions of the philosophy of natural law to human progress are epoch-making :

- (1) The various doctrines have always served the social need

of the age. They have helped to maintain stability against changes as in the time of the Greeks and the medieval church. They have inspired change against stability, notably after the Reformation and the Renaissance.

(2) The philosophy of natural law has inspired legislation and the use of reason in formulating systems of law.

(3) The period from the Renaissance down to the 18th century witnessed a lasting distinction drawn between positive law and morality.

(4) The same period also brought about the emancipation of the individual.

(5) A strong connection was established between positive law and freedom of the individual.

(6) The natural rights of the individual acquired great significance.

In the United States, they are enshrined in the Constitution. It is not always possible to justify arguments that have been founded on the doctrine of natural rights. Thus, slavery was justified on the ground that the right of property was a natural right. As slaves were property, slavery was a natural right and unalterable. Likewise, liberty in the Fourteenth Amendment of the American Constitution has been held to include unlimited freedom of contract and "person" has come to cover corporations. The result is that big corporations have been able to protect themselves behind the cover of the natural rights of an individual.

The influence of natural law ideas on English lawyers was also great. One of the effects was the doctrine of the supremacy of law. Natural law theories are reflected in the writings of certain legal authors such as Fortesque, Blackstone and St. Jerman. The modern law of quasi-contract was erected from avowed principles of natural justice. The conflict of laws was originally founded on natural justice. In cases of first impression, a judge must resort to his reason and sense of justice. The sense of justice of a judge plays a decisive role even when he is applying certain principles. It is all the more prominent where there are no principles to apply. The concept of reasonableness, particularly in tort, is the result of the ideas of natural law. The judicial

control of administrative and quasi-judicial functions is based on the principle that those who administer them must abide by the principles of natural justice. Foreign law is not applied in English courts if it is found contrary to the principles of justice. Occasionally, cases also reflect natural justice. In the case of *Sharington v. Strotton*, the argument was drawn from natural law as to the purpose of marriage. In the case of *Calvin*, we find the following statement. First, that the allegiance or faith of the subject is due unto the King by the law of nature; secondly, that the law of nature is part of the law of England; thirdly, that the law of nature was before any judicial or municipal law; fourthly, that the law of nature is immutable." In the case of *Somerset*, Lord Mansfield accepted the contention that slavery was an institution so odious to natural law that the English courts could not countenance it. The Law Merchant was conceived of as being based on principles of natural law which may have had something to do with its adoption in the time of Lord Mansfield. In certain overseas territories, until a system of law was officially introduced, natural law was resorted to in the administration of justice.

There is widespread revival of the concept of natural law in the world and there are many reasons for it. There is a general desire to restore closer relations between law and morality. People are not satisfied with the Austinian view of law which ignores morality altogether. It is also felt that there is a necessity for a juristic basis for a progressive interpretation of positive law. The development of sociological theories demands that the theory of law should allow a judicial interpretation of positive law in accordance with changing ideas and circumstances. The development of the idea of relativity in modern law has removed the chief difficulty in the way of the old idea of natural law. Laws can be universal and still vary in their contents. No law is eternal and every law must change according to circumstances. There is evolution everywhere. According to Kohler, law is based on reason and the actual law at any time in any country depends upon the stage of the development of the people concerned.

#### 4. Conventional Law

According to Salmond, conventional law means "any rule or system of rules agreed upon by persons for the regulation of their

conduct towards each other." It is a form of special law. It is law for the parties who subscribe to it. Examples of conventional law are the laws of cricket or any other game, rules and regulations of a club or any other voluntary society. Conventional law in some cases is enforced by the State. When it is enforced by the State, it becomes a part of the civil law. The view of some writers is that international law or the law of nations is also a kind of conventional law on the ground that its principles are expressly or impliedly agreed upon by the States concerned.

### 5. Customary Law

According to Salmond, customary law means "any rule of action which is actually observed by men—any rule which is the expression of some actual uniformity of some voluntary action." A custom may be voluntary and still it is law. When a custom is firmly established, it is enforced by the authority of the State. Customary law is an important source of law. This is particularly so among the conservative people who want to keep as much of the past as possible.

Customary laws come into existence due to a number of reasons. When some kind of action gets general approval and is generally observed for a long time, it becomes a custom. Sometimes, customs come into existence on the ground of expediency. Other reasons for their coming into existence are imitation, convenience etc. When they are recognised by the State, they become a part of the civil law.

There is a difference of opinion among the jurists about the scope and authority of customs. Some say that customs are valid law. There are others who say that they are simply a source of law. The former view is that of the jurists of the historical school and the latter view is that of the positivists. Both the views are exaggerations to a degree and give only a partial truth. Only a synthesis of the two views gives a true picture of custom. Customary law is a special kind of law and is different from civil law.

Prior to 1955, almost the whole of Hindu law was based on custom. Then came the Hindu Marriage Act in 1955. More Acts were passed on Hindu law in the succeeding years. The result is that the Hindu law regarding marriage, succession, mino-

rity and guardianship, adoption and maintenance is codified and governed by appropriate statutes. Custom can never override statute law. The custom of *sati* cannot be pleaded to a charge of murder or its abetment.

## 6. Practical or Technical Law

Practical or technical law consists of rules for the attainment of certain ends e.g., the laws of health, the laws of architecture etc. These rules guide us as to what we ought to do in order to attain a certain end. Within this category come the laws of music, laws of architecture, laws of style, etc.

## 7. International Law

According to Lord Birkenhead, international law consists of rules acknowledged by the general body of civilised independent States to be binding upon them in their mutual relations. It consists of those rules which govern sovereign States in their relations and conduct towards each other.

According to Starke, international law may be defined, for its great part, of the principles and rules of conduct which States feel themselves bound to observe and therefore do commonly observe in their relations with each other and which includes also (a) the rules of law relating to functioning of international institutions and organisations, their relations with each other and their relations with States and individuals and (b) certain rules of law relating to individuals so far as the rights and duties of such individuals are the concern of the international community.

Hughes writes: "International law is the body of principles and rules which civilised States consider as binding upon them in their mutual relations. It rests upon the consent of Sovereign States." Hall observes: "International law consists in certain rules of conduct which modern civilised States regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious persons to obey the laws of the country and which they also regard as enforceable by appropriate means in case of infringement." According to Lord Russel of Killowen, international law is "the aggregate of the rules to which the nations have agreed to conform in their conduct towards one another". Oppenheim writes:

“International law is the name for the body of customary and conventional rules which are considered legally binding (as distinguished from usage, morality and rules of so-called international comity) by civilised States in their intercourse with each other.”

According to Salmond, international law is essentially a species of conventional law and has its source in international agreement. It consists of those rules which the sovereign States have agreed to observe in their dealings with one another.

International agreements are of two kinds. They are either express or implied. Express agreements are contained in treaties and conventions. Implied agreements are to be found in the custom or practice of the States. In a wide sense, the whole of international law is conventional. In a narrow sense, international law derived from express agreement is called the conventional law of nations.

### *Nature of International Law*

There is a considerable divergence of opinion regarding the true nature of international law. John Austin, Willoughby and Holland regard international law as positive morality or the moral code of nations and do not concede that it is law properly so-called. According to Austin: “The Law obtaining between nations is not a positive law for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.” Austin defines positive law as a body of rules for human conduct set and enforced by a sovereign political authority. However, international law is not set or enforced by a political authority which is sovereign over other States for the regulation of whose relations that law is intended. In international relations, all States are theoretically equal however much they may differ in actual strength. There can be no common superior over sovereign States and in the relations between States, the notion of a positive law is excluded. According to Austin: “The law obtaining between nations is only set by a general opinion and the duties which it imposes are enforced by moral sanction.” In international relations, there are no sanctions in the sense of coercion by a sovereign power as there is no such power over and above the sovereign States. There is no independent arbiter of disputed questions beyond public opinion and no tribunal exists for apply-

ing to particular cases the principles recognised by the comity of nations. In the absence of definite and compelling sanctions, the validity and obligatory force of international law is dependent on the preparedness of any particular State to accept its substance. If we accept Austin's definition of law as a command addressed to political inferiors by a political sovereign superior and followed by a sanction in the event of disobedience, international law cannot be called law.

According to Holland, international law is the vanishing point of jurisprudence as it lacks any arbiter of disputed questions save public opinion, beyond and above the disputant parties themselves. Such rules as are voluntary and though habitually observed by every State in its dealings with the rest, can be called law only by courtesy. International law differs from ordinary law in being unsupported by the authority of a State. It differs from ordinary morality being a rule for States and not for individuals.

According to Lord Salisbury, international law "can be enforced by no tribunal and therefore to apply to it the phrase law is to some extent misleading". Coleridge observes: "Strictly speaking, international law is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver and a tribunal capable of enforcing it and coercing its transgressor, but there is no common law-giver to sovereign States and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of States are but evidence of the agreement of nations and do not, in England at least, *per se* bind the tribunals."

Professor Dias writes that it is an undoubted fact that the respect which States pay to international law is less than that which individuals pay to municipal law. There has always been a need to enhance the prestige of international law by calling in aid the magic of the word "law", especially in creating a sense of obligations. This is one reason why international lawyers are sensitive about Austin's exclusion of international law from the scope of law and want to prove that international law is really law.



Professor Dias refers to the view of Professor Hart on the subject. The view of Professor Hart is that there are sufficient analogies of content, as opposed to form, to bring the rules of international law nearer to municipal law. There are rules prescribing how States ought to behave which are accepted as guiding standards just as in municipal law. Appeals are made to precedent, writings and treatises as in municipal law and not to rightness or morality. Rules of international law, like those of municipal law, can be morally neutral. Like rules of municipal law, they can be changed by conscious act, e.g., by treaty. (*The Concept of Law*, Chapter 10).

Professor Dias points out that in spite of these resemblances between international law and municipal law, there are two important differences between them which cannot be overlooked. One difference is that the subjects of international law are primarily States and the disparity in strength between them far exceeds that between individuals in society. Moreover, there are other institutions which have claims, duties etc. but which are not States. Examples are the United Nations Organisation, the Holy See between 1871 and 1929 and other specialised agencies. Individuals as such are increasingly becoming subjects of international law which enhances the disparity between the various subjects. The other difference is that whereas the courts of a municipal order appeal to the same criterion or criteria by which to identify "laws", there is no coordination in the ways in which rules of international law are identified. There is no single criterion of identification because there are unrelated sets of tribunals, each of which identifies international law differently.

When one considers international law in a continuum, the differences become all the more pronounced. No consistent answer can be given to the question why the different criteria were adopted. In most cases, the adoption is ad hoc for the purpose of the instant dispute and not once for all. The predictability of decisions in any international tribunal is less than in municipal tribunals because there are fewer agreed rules and because of the greater intrusion of political considerations and national interests.

The basis of the binding force of international law is commonly ascribed to consent, but this is not a satisfactory explanation. A

basis in consent presupposes some rule which makes consent obligatory. The basis of that rule requires elucidation. If consent is the basis, it follows that once consent is withdrawn, the obligation to obey ceases. In municipal law, consent is unrealistic. Individuals are never asked if they consent to be bound by municipal laws, which are treated as binding regardless of consent. Even if some dissident declares that he no longer accepts a law, his withdrawal does not affect the coercive power of the State which comes into play irrespective of what the individual thinks. The so-called "binding force" rests in the psychological reactions inducing people to obey, among which fear of organised force is one factor. In the international sphere there is no effective machinery for applying overwhelming organised force. The principal reasons why States choose to obey international law are fear, if at all, of their neighbours and self-interest. Fear operates through war, reprisals, retortion, pacific blockade and naval and military demonstrations. These are calculated to deter weak rather than strong States. Fear of action by the United States Organisation is very slight on account of the use of veto in the Security Council. The greatest shortcoming of international law is the absence of effective machinery to carry out sanctions. In any case, such action is more likely to influence weak rather than strong States. Whether or not a given State at any time abides by a given rule of international law depends upon various considerations such as a desire to secure fair treatment for its own nationals at the hands of other States, nationalism, tradition, morality, diplomacy, economic interests and possibly fear. This shows that the working of international law is different from that of municipal law. International law continues mainly because States find in it a useful instrument of policy. (*Jurisprudence*, 4th edition, pp. 686-90).

According to Oppenheim, international law is law in the true sense of the term. For hundreds of years, more and more rules have grown up for the conduct of the States with one another. These rules are to a great extent customary rules but along with them are daily created more and more written rules by international agreements. Oppenheim admits that there is at present no Central Government above the governments of several States which could in every case secure the enforcement of the

rules of international law. For this reason, compared with municipal laws and the means available for its enforcement the law of nations is certainly weaker of the two. A law is the stronger, if more guarantees are given that it can and will be enforced. Starke writes: "International law is weak law. It is mainly customary. Existing international legislative machinery is not comparable in efficiency to State legislative machinery. In spite of the achievements of the United Nations in re-establishing a world court under the name of the International Court of Justice, there still is no universal compulsory jurisdiction for settling legal disputes between States. Finally, many of the rules of international law can only be formulated with difficulty and, to say the least, are quite uncertain. It was on this account that the attempt of the International Conference of 1930 at the Hague to codify certain branches of international law suffered a relative breakdown."

International law is regarded as a part of American law and is ascertained and administered by the courts of justice of appropriate jurisdiction. Likewise, the law the Prize Courts administer in England is not municipal law but international law.

## 8. Civil Law

According to Salmond, civil law is "the law of the State or of the land, the law of lawyers and the law courts". Civil law is the positive law of the land or the law as it exists. Like any other law, it is uniform and that uniformity is established by judicial precedents. It is noted for its constancy because without that, it would be nothing but the law of the jungle. It is enjoyed by the people who inhabit a particular State which commands obedience through the judicial processes. It is backed by the force and might of the State for purposes of enforcement. Civil law has an imperative character and has legal sanction behind it. It is essentially of territorial nature. It applies within the territory of the State concerned. It is not universal but general. It creates legal rights, whether fundamental or primary. It also creates secondary rights. Any infringement of law is always attendant with attachments, fine or imprisonment, or some other form of punishment which the society inflicts on the wrongdoer in order to show its displeasure against the person who violates the law.

The term civil law is derived from *jus civile* or civil law of the Romans. It is not so popular today as it used to be. The term positive law has become more popular than civil law. Sometimes, the term municipal law is used in place of civil law.

Holland prefers to use the term positive law and writes thus : "A law in the sense in which that term is employed in jurisprudence, is enforced by a sovereign political authority. It is thus distinguished not only from other rules which, like the principles of morality and the so-called laws of honour and of fashion are enforced by an indeterminate authority, but also from all rules enforced by a determinate authority which is either, on the one hand, superhuman or on the other hand, politically subordinate. In order to emphasize the fact that laws, in the strict sense of the term, are thus authoritatively imposed, they are described as positive laws."

However, Salmond prefers to use the term civil law instead of positive law and observes : "The term civil law, as indicating the law of the land, has been partially superseded in recent times by the improper substitute, positive law. *Jus positivum* was a title invented by medieval jurists to denote law made or established by human authority as opposed to the *jus naturale* which was uncreated and immutable. It is from this contrast that the term positive derives all its point and significance. It is not permissible, therefore, to confine positive law to the law of the land. All law is positive that is not natural. International law, for example, is a kind of *jus positivum*, no less than the civil law itself."

### Common Law

The general law of England can be divided into three parts viz., statute law, equity and common law. Statute law is made by the legislature and equity was developed by the Court of the Chancery. According to Salmond : "The common law is the entire body of English law, 'the total *corpus juris angliae* with three exceptions, namely (1) statute law, (2) equity and (3) special law in its various forms." The expression common law was adopted by English lawyers from the canonists who used it to denote the general law of the church as opposed to those divergent usages which prevailed in different local jurisdictions and superseded or modified within their

territorial limits the common law of Christendom. The development of common law is closely associated with the growth of King's justice in England after the Norman conquest. Formerly, justice was administered by the barons in their localities. The common law of England was produced during "the period which lies between William I and Edward I when royal justice gradually dwarfed and finally superseded all other justice." The triumph of the King's Court was achieved by the instrumentality of royal writs. By the time of Glanville, Chief Justiciar of Henry II (1154-89), a royal writ had been invented which could be sent to the Sheriff on a complaint by a tenant of the freehold that he was deforced of his land and thus have the case taken out of the court of the landlord. By means of the writ of right, the lord could be directed to do "full right" to the plaintiff and if he did not comply with the direction, the King's officer could do it for him. By the writ of 'Pone', the King's Court could call up a cause from the Sheriff's court. Holdsworth writes: "The invention of the writs was really the making of the English common law," which took place between 1150 and 1250 A. D. The special writs issued by the King's Bench were the writs of mandamus and certiorari. These writs undermined local jurisdictions and established the primacy of royal justice. By the time of Edward I (1272-1307), the King's justice was finally established in England and the judicial institutions assumed the form which they retained till 1875.

By the beginning of the 14th century, the Court of Chancery arose and began to administer justice by the side of common law courts. Equity was finally absorbed into the general law when the Judicature Act of 1873 united the common law and equity jurisdictions. Though equity and common law have become co-ordinate parts of a single system of general law, the original jurisdiction between them still persists and the term Common Law is even now used in contrast with Equity.

Upto 1873, there were two distinct systems of law in England administered by the ordinary courts of justice viz., the King's Bench, the Court of Common Pleas and the Court of Exchequer. In the Court of Chancery, the Chancellor decided cases not according to the common law but according to the principles of equity. The Judicature Act of 1873 provided for a High Court of

Justice with a Court of Appeal over it. The High Court of Justice was divided into five divisions: the Chancery, the Queen's Bench, Common Pleas, Exchequer and the Probate and the Divorce and Admiralty.

In its historical origin, common law was taken to mean the whole of the law of England including equity. Statute law was referred to separately because of its authority. In modern times, statute law has developed to a very great extent and even certain portions of the common law are undergoing a slow transformation into statute law by the process known as codification. The term Common Law is still used to mean the whole of the law of England when it is contrasted with the foreign systems of law like Roman law or French law.

### Equity

It was found during the 13th century in England that common law had become very rigid and that rigidity should be lessened by supplementing it by rules governed by the conscience of the judge. There were certain rules of natural justice prevalent at that time and those were used to supplement the principles of common law. The result was that a party who could not get any relief in the ordinary course, applied to the King who was the fountain of justice. The King referred those petitions to the Lord Chancellor who was "the keeper of the King's conscience". The Lord Chancellor considered those applications and gave relief in fit cases, particularly in those of frauds, errors and unjust judgments.

In course of time, the Lord Chancellor advised the judges of the Court of Chancery to supplement the law by principles of equity justice and good conscience. This resulted in a variety of decisions of a conflicting nature. It was found necessary to have uniformity in those judgments. That led to the formation of a body of equitable rules which were supplementary to the rules of common law. During the reign of Henry VI, the Lord Chancellor developed the *remedy of injunction* which emanated from Chancery Courts. By this remedy, the Chancellor prohibited the execution of decrees passed by the common law courts. It was in the matter of injunctions that there was a conflict between Lord Chancellor Ellesmere and Chief Justice Coke of the Common Law. Lord Chancellor issued an injunction prohibiting the holder of a decree

obtained by fraud from executing it and that decree had been passed by Chief Justice Coke. The dispute was referred to Lord Bacon who was the Attorney-General of England and he decided in favour of the Lord Chancellor. The result was that equitable principles came to be recognised as principles superior to the rules of common law. During the Chancellorship of Lord Eldon, equity became a body of principles decided on the basis of precedents laid down by judges in the Equity Courts. Today equity has been merged into law. "*The two streams flow side by side but their waters do not mingle*" Equitable principles are as effective as the principles of common law.

According to Salmond, the term equity has at least three distinct though related meanings. In the first sense, it means morality, honesty and uprightness. In the second sense, it means the principles of natural justice which temper the fixed rules of law. Wherever law is inadequate, rigid or technical, it is supplemented by justice, equity and good conscience. In the third sense, equity consists of a set of fixed rules. It is not something left to the good sense of the judge but it is a well-formulated set of rules. When we speak of equity under English law, we use the term in this narrow, restricted sense.

Equity became a source of law. The principles emanating from the conscience of the judge were made uniform and they were made into a body of rules called the rules of equity or equitable law. Out of the equitable principles have emerged laws such as the Law of Trusts, the Law of Mortgages, the Law of Quasi-Contracts, the Doctrine of Subrogation, Assignments and the recognition of several principles in the Partnership Act and the Companies Act. Several principles of equity are embodied in the Specific Relief Act.

### **Constitutional Law**

The term constitutional law has been defined by many writers. Hibbert defines Constitutional Law as "the body of rules governing the relation between the sovereign and his subjects and the different parts of the sovereign body. (*Jurisprudence*, p. 199).

According to Dicey: "Constitutional law includes all rules which directly or indirectly affect the distribution or exercise of

the sovereign power of the State. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other or which determine the mode in which the sovereign power or the members thereof exercise their authority." (*Law of the Constitution*, p 76).

Bouvier writes that constitutional law implies "the fundamental law of a State directing the principles upon which the Government is founded and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise"

Wade and Phillips write: "There is no hard and fast definition of constitutional law. In the generally accepted use of the term, it means the rules of law, including binding conventions, which regulate the structure of the principal organs of government and their relationship to each other and determine their principal functions."

According to Dr. Keith, it is the function of constitutional law to examine the organs by which the legislative, executive and judicial functions of the State are carried out, their inter-relations and the position of the members of the community in relation to those organs and functions of the State.

The view of John Austin is that positive law is a command of the sovereign and the sovereign himself is not bound by law as one cannot be bound by one's own commands. Constitutional law purports to control the sovereign. The conclusion of Austin is that constitutional law is not positive law or law in the strict sense, but is merely positive morality. Constitutional law derives its force only from public opinion regarding its expediency and morality. It belongs only to the class of moral rules and cannot be regarded as a part of positive law.

Willoughby points out that "constitutional provisions do not purport to bind these States but the Government. This vital distinction Austin did not grasp". The Government is only a limb of the State and a rule defining the manner of the exercise of governmental power need not necessarily impinge on the Austinian theory of sovereignty.



Salmond writes that the organisation of a modern State is of extraordinary complexity. It is usually divided into two distinct parts. The first part consists of its fundamental or essential elements. The second part consists of the details of State structure and State action. The first part is known as the Constitution of the State.

According to Salmond, constitutional law is the body of those legal principles which determine the Constitution of the State. The distinction between constitutional law and ordinary law is one of degree and not of kind. It is drawn for purposes of practical convenience. The more important, fundamental and far-reaching any principle or practice is the more likely it is to be classed as constitutional. The structure of the supreme legislature and the methods of its action pertain to constitutional law. The organisation and powers of the Supreme Court of Judicature pertain to constitutional law. In some States, though not in England, the distinction between constitutional law and the remaining portions of the legal system is made definite by the embodiment of the former in a special and distinct enactment, the terms of which cannot be altered by the ordinary forms of legislation. Such constitutions are said to be rigid, as opposed to those which are flexible. The Constitution of the United States is set forth in a document agreed upon by the founders of the Commonwealth as containing all those principles of State structure and action sufficiently important to be deemed fundamental and therefore constitutional. The provisions of this fundamental document cannot be altered without the consent of three-fourths of the legislatures of the different States. The English Constitution is flexible and is not to be found in a document. The method of its amendment is easy.

Salmond points out that the concept of constitutional law presents some difficulty to students of jurisprudence. If constitutional law is the body of those legal principles which determine the Constitution of a State, the problem is how the constitution of a State can be determined by law at all. There can be no law unless there is already a State and there can be no State without a Constitution. If the State and the Constitution are prior to the law, law cannot determine the Constitution. Therefore it can be said that constitutional law is not law in reality. The Constitution

is both a matter of fact and law. It consists not only of legal rules but also of constitutional practices. Constitutional practices are logically prior to constitutional law. There may be a State and a Constitution without any law, but there can be no law without a State and a Constitution. No Constitution can have its source and basis in the law. It has an extra-legal origin.

The constitutional facts which are extra-legal are reflected with more or less accuracy in courts of justice as constitutional law. Law develops for itself a theory of the Constitution. The American Constitution had its extra-legal origin in the independence it achieved by rebellion against the lawful authority of the English Crown. The constituent States of the United States of America established their Constitutions by way of popular consent after attainment of independence. Before these Constitutions were actually established, there was no law save that of England. The Constitution was established in defiance of the law of England. Therefore, the origin of the American Constitution was not merely extra-legal, but it was also illegal. As soon as these constitutions succeeded in becoming *de facto* established, they were treated as legally valid by the courts of those States. Constitutional law followed hard upon the heels of the constitutional fact. Courts, legislatures and law have their origin in the Constitution and therefore the Constitution could not derive its origin from them. The same is the case with every Constitution which is altered by way of illegal revolution. The Bill of Rights was not passed by any legal authority and William III did not assume the Crown by legal title and in spite of that the Bill of Rights is now good law and the successors of William III have valid titles.

The basic rules of a Constitution and of a legal system must ultimately be of customary nature. This is so even in a written Constitution. Basic customary rules differ from ordinary customary rules of law in that strictly they are not amenable to alteration by legislation or judicial decision. Ordinary customary rules can be amended or abrogated by such methods. Fundamental rules are not in the same category as the rules of morality.

A complete account of a Constitution involves a statement of constitutional custom as well as of constitutional law. It involves an account of the organised State as it exists in practice and in

fact, as well as of the reflected image of that organisation as it appears in legal history.

The Constitution *de jure* and the Constitution *de facto* are not necessarily the same but they tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself. Constitutional practice may alter while constitutional law remains the same and vice-versa. The most familiar and effective way of altering the practice is to alter the law. The will of the body politic, as expressed through the legislature and the courts, will commonly realise itself in constitutional fact no less than in constitutional theory. (*Salmond on Jurisprudence*, pp 83-87).

### *Amendment*

Every written Constitution has a provision for its amendment. The method of amendment of the American Constitution is highly rigid and complicated. The Constitution can be amended by three-fourths of the legislatures of the States in the United States. The English Constitution is unwritten and flexible. The method of its amendment is the same as that of passing an ordinary law. In India, Article 368 of the Indian Constitution deals with the amendment of the Indian Constitution.

### *Sources of English Constitutional Law*

According to Lord Bryce, English constitutional law is to be found in "the mass of precedents carried in men's memories or recorded in writing, of dicta of lawyers or statesmen, of customs, usages, understandings and beliefs bearing upon methods of government, together with a certain number of statutes, some of them containing matters of petty detail, others related to private just as much as to public law, nearly all of them presupposing and mixing up with precedent and customs and all of them covered with a parasitic growth of legal decisions and political habits, apart from which the statutes would be almost unworkable, or at any rate, quite different from their working from what they really are. The English Constitution is to be found in the great constitutional landmarks, statutes, judicial decisions, common law and conventions".

The great constitutional landmarks are the Magna Carta of 1215, the Petition of Rights of 1628, Bill of Rights of 1689, Act of

Settlement of 1701, Act of Union between England and Scotland of 1707, the Parliament Act of 1911 etc. All these constitutional landmarks form "only the addenda to the Constitution."

Another source of the English Constitution is the large number of statutes passed from time to time by the British Parliament. To this category belong the Reform Acts of 1832, 1867, 1884, 1918 and 1928. The Representation of the People Act of 1948 abolished the university constituencies. The Abdication Act of 1936, the Septennial Act, the Irish Free State Act of 1922, the Parliamentary and Municipal Elections Act of 1872, the Judicature Acts of 1873-76, the Ministers of the Crown Act of 1937 and the Statute of Westminster of 1931 belong to the same category.

Some of the judicial decisions on important matters are also a part of the English Constitution. Some of them are *Bannbridge v. Post-Master General* (1906), *Beatty v. Gillbanks*, *Wise v. Dunning*, *Godden v. Hales*, *Stockdale v. Hansard*, *Shirley v. Fagg*, *Bradlaugh v. Gosset*, *Ashley*, *Osborne v. Amalgamated Society*, *Attorney-General v. De Keyser's Royal Hotel Co.* (1920), *Liversidge v. Anderson* (1942), *Local Government Board v. Arlidge* (1915), *Entick v. Carrington*, *O' Kelly v. Harvey*, etc.

Another source of English constitutional law is the common law of England which has been defined by Ogg as "the vast body of legal precepts and usages which through the centuries have acquired binding and almost immovable character". Prof. Munro writes that "the common law, like statutory law, is continual in process of development by judicial decisions".

Another source of English constitutional law is the textbooks on that subject. Anson's *Law and Customs of the Constitution*, May's *Parliamentary Practice*, Dicey's *Law of the Constitution* and Bagehot's *English Constitution* can be put in this category.

Another important source of English constitutional law are the conventions of the English Constitution. They consist of "understandings, practices and habits which alone regulate a large portion of the actual relations and operation of the public authorities".

### *Administrative Law*

According to Prof. Wade: "Administrative law is primarily

concerned not with judicial control nor even legislation by delegation but with administration." According to Dr. Jennings: "Administrative law is the law relating to the administration. It determines the organisation, powers and duties of administrative authorities".

The view of Austin is that administrative law determines "the ends and modes to end in which the sovereign powers shall be exercised directly by the monarch or sovereign member or shall be exercised directly by the subordinate political superiors to whom portions of those powers are dedicated or committed in trust".

Prof. Holland divides public law into six divisions and puts administrative law in the second category. According to him, constitutional law is concerned with structure and administrative law is concerned with functions.

According to Prof. Robson, the term administrative law implies the jurisdiction of a judicial nature exercised by administrative agencies over the rights and property of citizens and corporate bodies.

In France, the term *Droit Administratif* is used in place of administrative law. According to Barthelemy, it "consists of all the legal rules governing the relations of public administrative bodies to one another and to individuals". Prof. Rene David defines *Droit Administratif* as "the body of rules which determine the organisation and the duties of public administration and which regulate the relations of the administrative authorities towards the citizens of the State".

A distinction is made between administrative law and constitutional law. According to Holland, constitutional law deals with various organs of sovereign power as at rest and administrative law deals with those organs as in motion. The first deals with the structure and the second with the functions of the State. The distinction between the two is one of degree and convenience and not of principle. While constitutional law deals with the general principles relating to organisation and powers of organs of the State and their relations *inter se* and towards the citizens, administrative law is that aspect of constitutional law which deals in detail with the powers and functions of administrative authorities.

### *General Law and Special Law*

According to Salmond, the whole body of law can be divided into two parts: general law and special law. General law consists of the general or the ordinary law of the land. Special law consists of certain other bodies of legal rules which are so special and exceptional in their nature, sources or application that it is inconvenient to treat them as standing outside the general and ordinary law. General law consists of those legal rules which are taken judicial notice of by the courts whenever there is any occasion for their application. Special law consists of the legal rules which courts will not recognise and apply them as a matter of course but which must be specially proved and brought to the notice of the courts by the parties interested in their recognition. According to Salmond, *the test of distinction is judicial notice*. By judicial notice is meant the knowledge which any court, *ex officio*, possesses and acts upon as contrasted with the knowledge which a court is bound to acquire on the strength of evidence produced for the purpose. For example, the court is presumed and bound to take judicial notice of the fact that there is monarchy in England and a republic in India. This fact need not be proved by leading evidence. Examples of general law are the law of contract as found in the Indian Contract Act, the penal law of India as found in the Indian Penal Code. Laws regarding prohibition, gambling etc, are special laws and have to be determined by a reference to the relevant clauses of the particular law enforced in any territory. If any party relies upon a particular law, it must bring that law to the notice of the court.

The matter can be illustrated by taking an example of one type of special law or custom. The court may not and ordinarily it does not, know what a particular custom is. The parties have to prove such a custom if they rely upon it.

Ordinarily, special laws are the very opposite of statute laws which courts are bound to know. Ignorance of law is no excuse. If a person does not take a licence for his dog due to negligence, he cannot take up the plea of his ignorance. He is liable to be fined even if in fact he did not know that such a licence was required. Some of the examples of special laws are the Maharashtra Ownership of Flats Act, the Tamil Nadu Gambling Act and the Calcutta Police Act.

The fact that the sun rises in the east and sets in the west need not be proved by evidence. The court is presumed and bound to know them *suo moto*. Likewise, the court is bound to take judicial notice of all the statute laws

### *Kinds of Special Law*

Salmond refers to six kinds of special laws and those are Local Law, Foreign Law, Conventional Law, Autonomic Law, Martial Law and International Law as administered in Prize Courts.

(a) *Local Law*: Local law is the law of a particular locality and not the general law of the whole country. There may be customs which have obtained the force of law in certain localities and within those localities, that customary law supersedes the general law. In England, before January 1, 1926, real property devolved in Kent according to the custom of Gavelkind and in Nottingham according to the custom of Borough-English. By Gavelkind custom, all the sons of the deceased owner and not merely the eldest son as under the general law, became equally entitled to his real property. Under Borough-English custom, the youngest son alone inherited such property. Customary law is found in India also. An easement right to privacy does not exist under the general law, but can be claimed by custom in Uttar Pradesh and Gujarat. A right of pre-emption in respect of immovable property cannot be claimed under the general law but such a right is recognised by custom in Bihar, Haryana and Delhi.

In addition to local customary law, there may be local enacted law which consists of enactments emanating from subordinate local legislative authority. They are recognised as having full force in the locality for which they have been formulated. The Madras City Improvement Trust Act, 1950 applies only to the city of Madras. It creates a local law only. In a sense, local law is older than the general law. Even before common law was evolved in England, there existed the customary law of the local communities.

(b) *Foreign Law*: It is essential in many cases to take account of a system of foreign law and to determine the rights and liabilities of the parties on that basis. Ignorance of law is no excuse and everyone is supposed to know the law of the land. However,

ignorance of foreign law is like the ignorance of a fact and can be excused.

In some cases, foreign law has to be taken into consideration to do justice between the parties. In the case of a contract entered into in a foreign country, justice cannot be done fully unless the case is decided according to the law of the place where the contract was entered into. Every State has evolved a set of rules which prescribe the conditions and circumstances in which foreign law is enforced by its courts. This is done for the sake of international comity. There is a sort of reciprocity in this matter and if one State accepts, it can expect the same from other States. However, if foreign law on any particular point is repugnant to the law of the country, municipal courts are not bound to enforce the same. In *Robinson v. Bland*, a contract to pay a gambling debt was entered into in France between Englishmen and made payable in England. Lord Mansfield held that although such a law was valid in the eye of French law, it was illegal in England and hence English courts were not bound to enforce it. The rules which regulate the application of foreign law are known as the Conflict of Laws or Private International Law. The rules of Private International Law may vary from State to State. The French have different rules from those of England. The same is true of the United States. While public international law is concerned with States, private international law is concerned with individuals and never with States.

(c) *Conventional Law*: Conventional law has its source in the agreement of those who are subject to it. Agreement is law for those who make it. Examples of conventional law are the rules of a club or a cooperative society. Some other examples of conventional law are the articles of association of a company, articles of partnership etc.

(d) *Autonomic Law*: By autonomic law is meant that species of law which has its source in various forms of subordinate legislative authority possessed by private persons and bodies of persons. A railway company may make bye-laws for regulating its traffic. Likewise, a university may make statutes for the government of its members. An incorporated company can alter its articles and impose new rules and regulations upon the shareholders. Although



autonomic law is not incorporated into the general law of the community, these rules are constituted by the exercise of autonomic powers of private legislation. Autonomic laws are made by autonomous bodies for the government of their members.

If we compare autonomic law with conventional law, we find that both of them are made by the very persons whom they are intended to govern. Conventional law binds only those who actually agree to its authority, but autonomic law has authority even on the dissentient minority.

Sir John Salmond explains the distinction between autonomic law and conventional law by referring to an incorporated company governed by articles of association. When the company is first formed, all the shareholders agree to those articles and are bound by them because of that agreement. To start with, the articles of association are a body of conventional law. The shareholders are given by law the authority by virtue of which they can alter the original articles of association according to the majority decision of the shareholders. In exercise of that authority, the majority of the shareholders can impose their will upon a dissentient minority and when they do so and alter the articles of association, they exercise powers of autonomous legislation. Autonomous law is a species of legislative activity imposed by superior authority while conventional law is based purely on agreement.

(e) *Martial Law*: Martial law is the law administered in the courts maintained by military authorities. Martial law is of *three kinds*:

- (i) It is the law for the discipline and control of the army itself and is commonly known as the military law. It affects the army alone and never the civil population.
- (ii) The second kind of martial law is that by which in times of war, the army governs any foreign land in its military occupation. The country is governed by the military commander through the prerogative of the sovereign. The law in this case depends upon the pleasure of the military commanders.
- (iii) The third kind of martial law is the law by which in times of war, the army governs the realm itself in derogation of the civil law so far as the same is required

for public safety or military necessity. The temporary establishment of military justice can be justified on the ground of necessity. The establishment of a military government and military justice is known as the proclamation of martial law. Courts cannot question the validity of the actions of a military commander if he had acted honestly.

Martial law is not to be confused with military law. The two are different concepts. While military law is a State law, martial law is based on common law. Military law is applicable to soldiers alone and is embodied in the Army Act. Offences under this Act are triable by the courts martial. As an ordinary citizen, a soldier is governed by the ordinary law of the land. While military law is applicable to soldiers alone, martial law is applicable to soldiers as well as civilians in times of war or tumult. Even when there is no war or rebellion, soldiers are governed by military law. Martial law is temporary while military law is permanent law.

According to Dicey, martial law cannot be declared even in times of war by the exercise of the prerogative of the Crown. That prerogative has not been exercised since the Petition of Rights of 1628 and has fallen into disuse. However, martial law was declared in Jamaica in 1865 and in Ireland in 1920 by an Act of Parliament and not by the exercise of the prerogative of the Crown. The protection given to the military men is also given by an Act of Indemnity. The Emergency Powers Act was passed in 1940 by the British Parliament and that Act authorised the creation of special war-zone courts to act in place of ordinary courts when the invasion actually took place.

(f) *International Law as administered in Prize Courts (Prize Law)*: International law is a kind of conventional law. As a special law, it refers to that portion of the law of nations which is administered by the Prize Courts of the State in times of war. Prize law is that part of law which regulates the practice of the capture of ships and cargoes at sea in times of war. International law requires that all States desiring to exercise the right of capture must establish and maintain within their territories what are known as Prize Courts. It is the duty of those courts to investigate the legality of all the captures of ships and cargoes. If the seizure is lawful, the property

is adjudged as a lawful prize of war. If the same is found unlawful, orders are passed for the return of that property. Prize Courts are established by and belong exclusively to the individual State by which the ships and cargoes are captured. In spite of that, the law administered by the Prize Courts is not the law of the country but international law. Lord Parker writes: "The law which the Prize Court is to administer is not national law or as it is sometimes called, the municipal law, but the law of nations—in other words, international law. Of course, the Prize Court is a municipal court and its decrees and orders owe their validity to municipal law. The law it enforces may therefore in one sense be considered a branch of municipal law."

Prize courts were set up to decide the fate of the ships and cargoes captured during the war between India and Pakistan in 1971

(g) *Mercantile Customs*: Another kind of special law consists of the body of mercantile usage known as the Law Merchant. The whole of the Indian law relating to *hundis* derives its origin from mercantile customs

### SUGGESTED READINGS

- |                |   |
|----------------|---|
| Bodenheimer    | : <i>Jurisprudence.</i>   |
| Bryce, Lord    | : <i>Studies in History and Jurisprudence.</i>                    |
| Buckland, W.W. | : <i>Equity in Roman Law</i> , London, 1911.                      |
| D' Entreves    | : <i>Natural Law.</i>   |
| Fuller, L L.   | : <i>Legal Fictions</i> , 1967.                                   |
| Haines         | : <i>The Revival of Natural Law Concepts.</i>                     |
| Hart, H L A    | : <i>The Concept of Law</i> , Oxford, 1970.                       |
| Hibbert        | : <i>Jurisprudence.</i>   |
| Holland, T.E.  | : <i>Elements of Jurisprudence</i> , Oxford, 1924.                |
| Jennings       | : <i>The Law and the Constitution.</i>                            |
| Keeton, R.E.   | . <i>Venturing to do Justice</i> , Oxford University Press, 1969. |
| Lightwood      | : <i>Nature of Positive Law.</i>                                  |
| Lloyd, D.      | . <i>The Idea of Law</i> , 1973                                   |
| Maine, Henry   | : <i>International Law.</i>                                       |

- Maine, Henry : *Early Law and Custom.*
- Markby, W. : *Elements of Law*, Oxford, 1905.
- Paton, G.W. : *A Textbook of Jurisprudence*, Oxford, 1972.
- Pollock : *Essays in the Law.*
- Pollock and Maitland : *History of English Law.*
- Ritchie, D.G. : *Natural Rights.*
- Rommen : *Natural Law* (1947).
- Salmond : *Jurisprudence*
- Troeltsch : *Natural Law and Humanity*
- Wheaton : *International Law.*
- Wright : *The American Interpretation of Natural Law.*

## IV

### CLASSIFICATION OF LAW

For a proper understanding of law, a classification of laws is not only desirable but also necessary. It makes clear the relation between different rules and their effect on each other. It also helps in arranging them in a concise and systematic manner. It can help a lawyer to understand the law.

Classifications of laws have been made from time to time. The Roman jurists attempted a classification of laws. The Hindu law-givers gave 18 titles or heads of *Vyavahara* or civil law. They made a distinction between civil and criminal law and also classified criminal law under various heads

While classifying laws, we must not forget that no classification of laws is going to be permanent. Every classification is based on the law as it was when the classification was made. However, law keeps on changing according to the needs of the people at different times and in different places. Hence the nature and shape of law must continue to change. The result is that in every age, law needs a new classification. The classification which applies to a particular community may not apply to another community. Moreover, the distinctions between various kinds of laws may not be very clear.

#### **International Law and Municipal Law**

Law may be broadly divided into two classes: international law and municipal law. Whatever the objections raised against the claim of international law to be called international law, it is now recognised that international law is not only law but also a very important branch of law.

International law is divided into two classes: public international law and private international law. Public international law is that body of rules which governs the conduct and relations

of the States with each other. By private international law we mean those rules and principles according to which cases having foreign element are decided. If a contract is made between an Indian and a Pakistani which is to be performed in Sri Lanka, the rules and principles on which the rights and liabilities of the parties depend are to be determined by private international law. Critics point out that the term private international law is not correct. The adjective "international" is wrongly given to it as it does not possess any characteristics of international law. Private international law applies to individuals and not to States. Moreover, the rules and principles of private international law vary from State to State and there is no uniformity. Private international law is enforced by municipal courts which apply municipal law and not international law. In order to avoid controversy, it is suggested that private international law be called Conflict of Laws and should be treated as a branch of municipal private law.

### *Municipal Law*

Municipal law is the law applied within a State. It can be divided into two classes: public law and private law. Public law determines and regulates the organisation and functioning of the State and determines the relation of the State with its subjects.

Public law is divided into three classes: constitutional law, administrative law and criminal law. Constitutional law determines the nature of the State and the structure of the government. It is superior to the ordinary law of the land. Constitutional law is written in India and the United States but it is unwritten in England. The modern tendency is to have written constitutions.

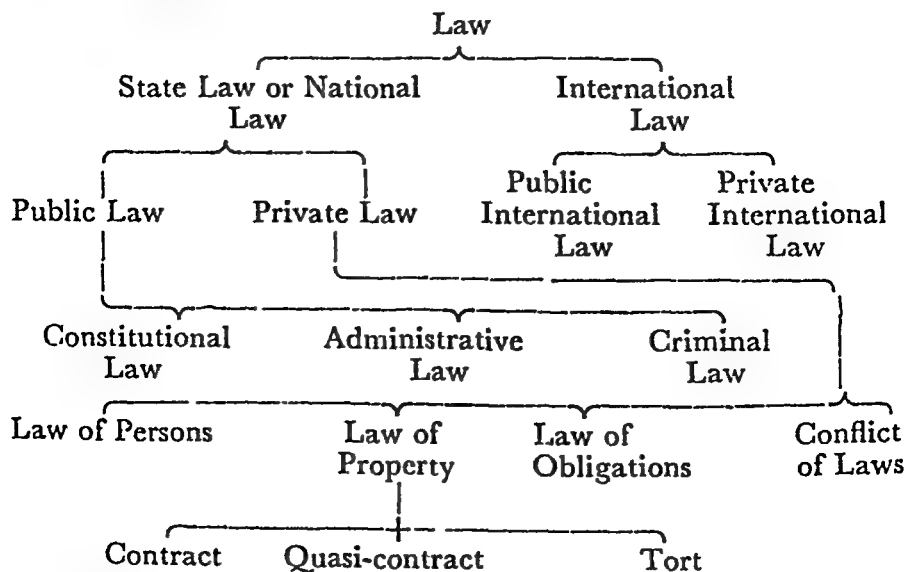
Administrative law deals with the structure, powers and functions of the organisation of administration, the limits of their powers, the methods and procedures followed by them and the methods by which their powers are controlled including the legal remedies available to persons whose rights have been infringed.

Criminal law defines offences and prescribes punishments for them. It not only prevents crimes but also punishes the offenders. Criminal law is necessary for the maintenance of law and order and peace within the State. In criminal cases, it is the State

which initiates proceedings against the wrongdoers. The State is always a party in criminal cases.

Private law regulates and governs the relations of citizens with one another. The parties are private individuals and the State decides the disputes among the people. There is great difficulty in classifying private law. A general classification of private law is the law of persons, the law of property, the law of obligations, the conflict of laws, contracts, quasi-contracts and tort.

The following is a classification of laws :



Critics point out many defects in the above classification of laws. Many of the classes of laws do not exist in many legal systems of the world. Those branches of law which have recently been developed cannot be put under any classification. The result is that the classification given above is neither universal nor exhaustive. Many jurists have attempted classifications on different principles. New branches of law are growing and developing rapidly in different parts of the world and provision has to be made for them in any classification of laws. Industrial law and commercial law are such subjects.

## V

### LAW AND MORALS

In ancient times, there was no distinction between law and morals. The Hindu jurists in ancient India did not make any distinction between law and morals. However, later on, some distinction came to be made in actual practice. The *Mimansa* made a distinction between obligatory and recommendatory rules. By the time the commentaries were written, the distinction was clearly established in theory also. The commentators not only pointed out the distinction but also dropped in actual practice those rules which were based purely on morals. The doctrine of "*factum valet*" was recognised. That doctrine means that an act which is in contravention of some moral injunction should be considered valid if accomplished in fact. In its decisions, the Privy Council made a distinction between legal and moral injunctions. The same is the case with the Supreme Court of India.

The same was the condition in Europe. In the name of the doctrine of natural rights, the Greeks formulated a theoretical moral foundation of law. Likewise, the Roman jurists recognised, in the name of natural law, certain moral principles as the basis of law. During the Middle Ages, Christian morals were considered as the basis of law. After the Reformation in Europe, it was contended that law and morals were distinct and separate and law derived its authority not from morals but from the State. Morals had their source in religion or conscience. During the 17th and 18th centuries, the theories of natural law had a moral foundation and law was linked with morals. During the nineteenth century, John Austin maintained that law had nothing to do with morals and he defined law as the command of the sovereign. Law alone was the subject-matter of jurisprudence. Austin was supported by many jurists. Kelsen maintained that only the legal norms were the subject-matter of jurisprudence. He excluded from the study of law all other considerations, including



morals. There is again a new trend in modern times. The sociological approach to law indirectly studies morals also although a distinction is made between law and morals and law alone is considered as the proper subject-matter of study. However, they study other forces also including morals while tracing the origin, development, functions and ends of law.

### **Distinction between Law and Morals**

There is a distinction between law and morals. Vinogradoff writes: "Law is clearly distinguishable from morality. The object of law is the submission of the individual to the will of organised society while the tendency of morality is to subject the individual to the dictates of his conscience." According to Pollock: "Though much ground is common to both, the subject-matter of law and ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules and is not included in it and the purposes for which they exist are different." Duguit writes: "Law has its basis in social conduct. Morals go on intrinsic value of conduct. Hence it is vain to talk about law and morals. The legal criterion is not an ethical criterion "

According to Paton: "Morals or ethics is a study of the supreme good. Law lays down what is convenient for that time and place, ethics concentrates on the individual rather than society; law is concerned with the social relationship of men rather than the individual excellence of their character; ethics considers motive as all important, law insists merely by conduct with certain standards and seldom worries for motive. But it is too narrow to say that ethics deals only with the individual or that ethics treats only of the interior and law only of the exterior, for ethics in judging acts must consider the consequences that flow from them. Moreover, ethical duties of man cannot be considered without considering his obligation to his fellows or his place in society" Pound observes: "Law and morals have a common origin but they diverge in their development." Bentham says: "In a word, law has just the same centre as morals but it has by no means the same circumference." According to Korkunov. "The distinction between morals and law can be formulated very simply. Morality furnishes the criterion for the proper evaluation of our interests; law marks out the limits within which they ought to be confined."

Arndts writes that there are four points of difference between law and morals.

(i) In law, man is considered as a person because he has a free will. In morals, we have to do with determining the will towards the good.

(ii) Law considers man only in so far as he lives in community with others; morals give a guide to lead him even if he were alone.

(iii) Law has to do with acts in so far as they operate externally, morals look to the intention—the inner determination and direction of the will.

(iv) Law governs the will so far as it may be by external coercion; morals seek a free self-determination towards the good.

From the above it follows that whereas legal rules do require external conduct and are indifferent to motives, intentions or other internal accomplishments of conduct, morals do not require any specific external action but only a goodwill or proper intention or motive. If a person does something forbidden by moral rules or fails to do what they require, the fact that he did so unintentionally and in spite of every care is an excuse from moral blame. A legal system or custom may have rules of strict liability under which those who have violated the rules unintentionally and without fault may be liable for punishment.

### *Hart*

Professor H. L. A. Hart writes that the vague sense that the difference between law and morals is connected with a contrast between the internality of the one and the externality of the other, is too recurrent a theme about law and morals to be altogether baseless and cannot be dismissed. He refers to four cardinal features which are designed to distinguish morality not only from legal rules but also from other forms of social rules. Those features are importance, immunity from deliberate change, voluntary character of moral offences and the form of moral pressure.

(a) *Importance*: As regards importance, the essential feature of any moral rule or standard, as something of great significance, may appear vague, yet it may manifest itself in a number of ways: (i) in the simple fact that moral standards are maintained against

the drive of strong passions which they restrain and at the rate of sacrificing considerable personal interest, (ii) in the serious forms of social pressure exerted not merely to secure conformity in individual cases but to secure that moral standards are conveyed as a matter of course to all in society; (iii) in general recognition that if moral standards were generally accepted, far reaching and distasteful changes in the life of individuals would occur. In contrast with morals, the rules of deportment, manners, dress and a few rules of law occupy a relatively low place in the scale of serious importance. They may be tiresome to follow but they do not require much sacrifice. No great pressure is put to obtain conformity and no great alterations in other areas of social life would follow if they were not observed or changed. Much of the importance ascribed to the maintenance of moral rules may be simply explained on rationalistic lines. Though they demand sacrifice of individual interests on the part of the person bound, compliance with them obtains vital interests which all share alike. It does so either by defending persons from harm or by maintaining the fabric of an orderly society. Legal rules may not have the same importance as moral rules have. For a legal rule may be thought quite important to maintain and may commonly be agreed that it should be repealed. It would be futile to think of a rule as a part of the morality of a society even though none thought it any longer important or worth maintaining.

(b) *Immunity from Deliberate Change*: It is correct to say of a legal system that new legal rules can be inserted and old ones changed or repealed, but there are some rules which may be saved from a deliberate change through a written Constitution limiting the competence of the supreme legislature. However, moral rules cannot be brought into existence or altered or done away with in this way. Standards of conduct cannot be endowed with or deprived of moral status by human fiat, though the day-to-day use of such concepts as enactment and repeal indicates that the same is not true of law. Though a moral rule or tradition is immune from repeal or change by deliberate choice or enactment, the enactment or repeal of laws may well be among the causes of a change or decay of some moral standard or tradition. The incompatibility of the idea of morality or tradition with that of change by deliberate enactment should be demarcated from that of the immunity

enjoyed by certain laws in some systems through the restrictive clauses of the Constitution. Such immunity is not an indispensable condition in the status of law as a law as such immunity is removable by constitutional amendments. Unlike such legal immunity from legislative change, the incapacity of morals or traditions for similar modes of change is not something which varies from community to community or from time to time. It is incorporated in the meaning of these terms. The idea of moral legislature with competence to make and change morals, as legal enactments make and change law, is repugnant to the whole notion of morality.

(c) *Voluntary character of moral offences*: The contention that morals are connected with what is known as internal conduct while law is connected with external conduct, is in part a mis-statement of the two features. If a person whose action has offended against moral rules succeeds in establishing that he did that unintentionally and in spite of every precaution that was plausible for him to take, he is excused from moral responsibility and to blame him in these situations would be morally condemnable. Moral blame is excused because he has done all that he could do. In any developed legal system, the same is true up to a point as the general requirement of *mens rea* is an element in criminal responsibility designed to secure that those who offend without carelessness, unwittingly, or in conditions in which they lacked the bodily or mental capacity to conform to law, should be excused. A legal system would be open to serious moral criticism if this were not so, at any rate in cases of serious crimes carrying severe punishments. Legal responsibility is not inevitably excluded by the demonstration that an accused could not have kept the law which he has broken. In the case of morals, "I could not help it" is always an excuse and moral obligation would entirely be different from what it is if the moral "ought" did not in this sense imply "can". It is significant to note that "I could not help" is only an excuse and not justification. The claim that morals do not require external conduct rests on a confusion of the two notions. The internal aspect of morals does not always mean that morals are never a form of outward conduct, but it is a pre-condition for moral responsibility that the individual must have a certain kind of control over his conduct. Even in morals the distinction between "he did not

do the wrong thing” and “he could not help doing what he did” is obvious

(d) *Form of Moral Pressure*: The facts that have led to the interpretation of morality as internal are that if it were the case that whenever someone was about to break a rule of conduct only, threats of physical punishment or unpleasant consequences were used in argument to dissuade him, then it would be improbable to treat such a rule as a part of the morality of the society, though that would not be any objection to treating it as a part of its law. The typical form of legal pressure may be said to consist in such threats, whereas with morals, the typical form of pressure consists in appeals to the respect for rules. Moral pressure is exerted not by threats or by appeals to fear or interest, but by reminders of the moral character of the action contemplated and the demands of morality. It is true that sometimes moral threats are accompanied by threats of physical punishment or by appeals to ordinary personal interest, but deviations from the moral code meet with a number of hostile social reactions ranging from informal expressions of contempt to severance of social relations. However, emphatic reminders of what the rules demand appeals to conscience and emphasis on the operation of guilt and remorse are the characteristic and most important kinds of pressure used for the support of social morality. A simple result of the acceptance of moral rules and standards is that it should be supported in these ways as things which it is supremely and clearly important to maintain.

Morals are concerned with the individual and lay down rules for the moulding of his character. Law concentrates mainly on society and lays down rules concerning the relationships of individuals with each other and with the State. Morals look to the intrinsic value of conduct. They take into consideration the motive. Law is concerned with the conduct of the individual for which it lays down standards. Morals are an end in themselves. They should be followed because they are good in themselves. Law is for the purpose of convenience and expediency. Its chief aim is to help smooth running of society. The observance of morals is a matter of individual conscience. Law brings into the picture the complete machinery of the State where the individual submits himself to the will of the organised society

and is bound to follow its rules. Generally, morals are considered to be of universal value but law varies from society to society, time to time and place to place. Laws and morals differ in their application. Morals are applied after taking into consideration individual cases whereas the application of law is uniform.

### **Relationship between Law and Morals**

A study of the various legal systems makes it clear that law and morals have had a long union with occasional desertion and judicial separation but have never been completely divorced. There are indeed many different types of relations between law and morals and there is nothing that can profitably be singled out for study as the relation between them. The view of Stammler is that jurisprudence depends much upon moral ideas as just law has need of ethical doctrine for its complete realisation. Positive law and just law correspond to positive morality and rationally grounded ethics. There is no difference and if any, it is only the difference of manner in which the desire for justice presents itself. C K. Allen observes thus on the relationship between law and morality: "Our judges have always kept their fingers delicately but firmly upon the pulse of the accepted morality of the day." Lord Mansfield says that "the law of England prohibits everything which is *contra bonos mores*". It is true that the development of law, at all times and places, has in fact been profoundly influenced both by conventional morality and ideals of particular social groups and also by the forms of enlightened moral criticism of those people whose moral horizon has transcended the morality currently accepted.

#### *View of Hart*

The view of H.L.A. Hart is that there are many different types of relations between law and morals and there is nothing which can profitably be singled out for study as the relation between them. Instead it is important to distinguish some of the many different things which may be meant by the assertion or denial that law and morals are related. Sometimes what is asserted is a kind of connection which few, if any, have ever denied; but this indisputable existence may be wrongly accepted as a sign of some more doubtful connection, or even mistaken for it. It cannot be seriously disputed that the development of

law has been profoundly influenced at all times and places both by the conventional morality and ideals of particular social groups and also by the forms of enlightened moral criticism urged by individuals whose moral horizon has transcended the morality currently accepted. A legal system must exhibit some specific conformity with morality or justice or must rest on a widely diffused conviction that there is a moral obligation to obey it. Though this proposition may, in some sense, be true, it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include tacitly, if not explicitly, a reference to morality or justice. (*The Concept of Law*, p 181).

### *Pound on four stages*

Dean Roscoe Pound has described four stages in the development of law with respect to morality. (i) The first stage is a stage of indifferentiated ethical custom, customs of popular action, religion and law. Analytical jurists called it a pre-legal stage in the development of law and law and morals were the same thing. 'They were the two faces of the same coin. (ii) The second stage is that of strict law, codified or crystallised, which in time is outstripped by morality and has not sufficient power of growth to keep abreast. (iii) The third stage is that of infusion of morality into the law and reshaping it by morals. In that stage, both the ideas of equity and natural law are potential agencies of growth. (iv) The final stage is that of conscious constructive law-making, the maturity of law, in which morals and morality are for the law-maker and that law alone is for the judge.

A study of the relationship between law and morals can be made from three angles: (a) morals as the basis of law, (b) morals as the test of positive law, and (c) morals as the end of law.

(a) *Morals as basis of Law*: As regards morals as the basis of law, there was no distinction between law and morals in the early stages of society. All the rules originated from the common source and the sanction behind them was of the same nature which were mostly in the nature of supernatural fear. When the State came into being, it picked up those rules which were important from the point of view of society and whose observance could be secured. 'The State enforced those rules and they came to be called law. Thus, law and morals have a common origin

but they came to differ in course of development. Hence it can be said that "law and morals have a common origin but diverge in their development." On account of their common origin, many rules are common to both law and morals.

Though law and morality are not the same and many things may be immoral which are not illegal, yet the absolute divorce of law from morality would result in fatal consequences. Morals are not the basis of all legal rules. There are a number of legal rules which are not based on morals and some of them are even opposed to morals. Morals will not hold a man vicariously liable. Likewise, in cases where both the parties are blameless and they have suffered by the fraud of a third party, law may impose the loss upon the party which is capable of bearing it but that may not be approved by morality.

(b) *Morals as test of Law*: As regards morals as the test of law, it has been contended by a number of jurists that law must conform to morals. That view was supported by the Greeks and the Romans. In Rome, law was made to conform to natural law which was based on certain moral principles and as a result, *jus civile* was transformed into *jus gentium*. Most of the ancient jurists were of the view that law, even if it was not in conformity with morals, was valid and binding. During the Middle Ages, the Christian Fathers maintained that law must conform to Christian morals and any law which did not conform to them was invalid. During the 17th and 18th centuries when the theory of natural law was popular, it was contended that positive law must conform to natural law and any law which did not conform to natural law was to be disobeyed and the government which made that law was to be overthrown. In modern times, a law is considered to be valid and binding even if it is not in conformity with morals. However, ordinarily, laws conform to morals. That is largely due to the fact that there is a close relation between law and the life of a community. In the life of a community, morals occupy an important place. Paton writes: "If the law lags behind popular standard, it falls into disrepute; if the legal standards are too high, there are great difficulties of enforcement." (*A Textbook of Jurisprudence*).

(c) *Morals as end of Law*: As regards morals as the end of law, morals have often been considered as the end of law and many



eminent jurists have defined law in terms of justice. It is contended that the aim of law is to secure justice which is very much based upon morals. In most of the languages of the world, the words used for law convey the idea of justice and morals also. In Sanskrit, the word for law is *Dharma* which also implies morals. However, the view of the analytical jurists is that a study of the ends of law is beyond the domain of jurisprudence, but sociological approach considers that study as very important. According to this view, law has a purpose. It is a means to an end which is the welfare of society. The immediate end of law is to secure social interests which means that the conflicting interests of the members of society should be weighed and evaluated and the interests which can bring greater benefit with the least sacrifice should be recognised and protected. Morals is an evaluation of interests. Law is and also seeks to be a delimitation in accordance therewith. According to Korkunov, the "idea of value is therefore the basal conception of ethics. No other term, such as duty, law or rights, is final for thought. Each logically demands the idea of value as the foundation upon which it finally rests. One may ask, when facing some apparent claim of morality, 'why is this my duty, I must obey this law, or why regard this course of action as right?' The answer to any of these questions consists in showing that the requirements of duty, law and right tend in each case to promote human welfare to yield what men do actually find to be of value." (*General Theory of Law*).

### **Morals as part of Law**

It is contended by some writers that even if law and morals are distinguishable, morality is in some way an integral part of law or of legal development. Morality is "secreted in the interstices" of the legal system and to that extent is inseparable from it. This viewpoint has been put forward in various ways. It is said that law in action is not a mere system of rules but involves the use of certain principles, such as that of equitable and the good. By the skilled application of these principles to legal rules, the judicial process distils a moral content out of the legal order, though it is admitted that this does not permit the rules themselves to be rejected on the general ground of their morality. Another approach confers upon the legal process an inherent power to reject immoral rules as essentially non-legal. Even the positivist

does not deny that many factors, including morality, may and do concur in the development of a legal rule and where there is a gap or a possible choice within the legal system, moral or other extra-legal pressures may cause that gap to be filled or the choice to be determined in one way rather than another. What the positivists insist is that once the rule is laid down or determined, it does not cease to be law because it may be said or shown to be in conflict with morality.

### **Legal Enforcement of Morals**

A good deal of controversy has arisen in recent years as to whether the fact that conduct is, by common standards, regarded as immoral, in itself justifies making that conduct punishable by law. The view of Lord Devlin is that there is public morality which provides the cement of any human society and law, especially criminal law, must regard it as its primary function to maintain this public morality. Whether in fact in any particular case the law should be brought into play by specific criminal sanctions, must depend upon the state of public feeling. Conduct which arouses a widespread feeling of reprobation, a mixture of intolerance, indignation and disgust, deserves to be suppressed by legal coercion in the interests of the integrity of society. The conclusion of Lord Devlin is that if vice is not suppressed, society could crumble. To quote him: "The suppression of vice is as much the law's business as the suppression of subversive activities."

Prof. Hart also accepts the need for law to enforce some morality. The real area of dispute is where the line should be drawn. J. S. Mill drew it at harm to others. According to Hart, some shared morality is essential to society. If any society is to survive, if any legal system is to function, then there must be rules prohibiting, for example, murder. The rules essential for a particular society may also be enforced. "For any society there is to be found ..... a central core of rules or principles which constitutes its pervasive and distinctive style of life."

### **Influence of Morals on Law**

Law and morals act and react upon and mould each other. In the name of justice, equity, good faith and conscience, morals have infiltrated into the fabric of law. Moral considerations play an important part while making law, interpreting law and exercis-

ing judicial discretion. Morals act as a restraint upon the power of the legislature. No legislature will dare to make a law which is opposed to the morals of society. All human conduct and social relations cannot be regulated and governed by law alone and very many relations are left to be regulated by morals and law does not interfere with them. Morals perfect the law. Paton writes: "In marriage, so long as love persists, there is little need of law to rule the relations of the husband and wife—but the solicitor comes in through the door as love flies out of the window." (*A Textbook of Jurisprudence*).

The sociological approach is very much concerned with the ends to be pursued by law. The result is that morals have become a very important subject of study for good law-making. Morals also exercise a great influence on international law. The brutalities committed during the World Wars have forced the people to turn back to morals and efforts are being made to establish standards and values which must be followed by nations. If law is to remain closer to the life of the people, it cannot ignore morals.

### SUGGESTED READINGS

- |                 |  |
|-----------------|--|
| Berlin          | : <i>Two Concepts of Liberty</i> , 1969.                         |
| Devlin, Lord    | : <i>The Enforcement of Morals</i> , 1965.                       |
| Duster, Troy    | : <i>The Legislation of Morality</i> , 1970.                     |
| Fuller, Lon     | : <i>The Morality of Law</i> , 1969.                             |
| Hart, H.L.A.    | : <i>Law, Liberty and Morality</i> , 1963.                       |
| Hart, H.L.A.    | : <i>The Concept of Law</i> , 1961.                              |
| Lamont          | : <i>Value Judgment</i> .  |
| Lloyd, Lord     | : <i>Introduction to Jurisprudence</i> , London, 1979.           |
| Mitchell, Basil | : <i>Law, Morality and Religion in a Secular Society</i> , 1967. |
| Ranulf          | : <i>Moral Indignation and Middle Class Psychology</i> , 1938.   |
| Sinclair        | : <i>Prohibition: The Era of Excess</i> , 1962.                  |
| Summers         | : <i>Essays in Legal Philosophy</i> , 1968.                      |

## VI

# STATE AND SOVEREIGNTY

### Definition of State

Many definitions of State have been given by various writers. Holland defines State as "the numerous assemblage of human beings, generally occupying a certain territory amongst whom the will of the majority or of an ascertainable class of persons, is by the strength of such a majority or class, made to prevail against any of their number who oppose it."

Willoughby writes that the State exists "where there can be discovered in any community of persons a supreme authority exercising control over the social actions of individuals and groups of individuals and itself subject to no such regulation." According to Sidgwick, the State is a "political society or community, i.e., a body of human beings deriving its corporate unity from the fact that its members acknowledge permanent obedience to the same government which represents the society in any transactions that it may carry on as a body with other political bodies"

Phillimore defines the State as "a people permanently occupying a fixed territory, bound together by common laws, habits and customs into one body politic exercising through the medium of an organised government independent sovereignty and control over all persons or things within its boundary, capable of making war and peace and of entering into international relations with the communities of the globe."

According to Bluntschli: "The State is a combination or association of persons in the form of Government and governed on a definite territory, united together into a moral organisation, masculine personality or more shortly, the State is the politically organised national person of a definite country"

Garner writes: "The State is a community of persons more or less numerous, permanently occupying a definite portion of

territory, independent or nearly so of external control and possessing organised government to which the great body of inhabitants render habitual obedience."

According to Gettell: "State is a community of persons permanently occupying a definite territory, legally independent of external control and possessing organised government which creates and administers law over all persons and groups within its jurisdiction. Abstractly considered, the State is juridical entity or person; concretely considered, it is the community, the territory which it occupies and the governmental organisation through which it wills and acts."

Bentham writes: "When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons, of a known and certain description (whom we may call Governor or Governors), such persons altogether (subjects and Governors) are said to be in a state of political society."

According to Woodrow Wilson: "A State is a people organised for law within a definite territory." MacIver writes: "The State is an association which acting through law as promulgated by a government, endowed to this end with coercive power, maintains within a community territorially demarcated the universal external conditions of social order." Brierly observes: "The State is an institution, that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on."

Salmond defines a State with reference to its essential functions as "a society of men established for the maintenance of order and justice within a determined territory, by way of force."

### **Elements of the State**

(1) There are certain essential elements of the State. The first essential element is population. There can be no State without a people. The population of a State may be large or small.

(2) Another essential element of State is its territory. Wandering people cannot constitute a State. It is only when they

settle down on some definite territory that they constitute a State. The size of the territory of a State is not very material. It may be large or small and there are both kinds of States. Salmond does not regard territory as an essential element of the State. To quote him: "The territory of a State is that portion of the earth's surface which is in its exclusive possession and control. It is that region throughout which the State makes its will permanently supreme and from which it permanently excludes an alien interference. The exclusive possession of a defined territory is a characteristic feature of all civilised and normal States. It is found to be a necessary condition of the efficient exercise of governmental functions." However, it is not essential to the existence of a State. A State without a fixed territory—a nomadic tribe for example—is perfectly possible. A non-territorial society may be organised for the fulfilment of the essential functions of government and if so, it will be a true State. However, such a state of affairs is so rare that it is permissible to disregard it as abnormal. It is with the territorial State that we are concerned

(3) Another essential element of the State is Government which is the machinery through which the administration of a country is carried on. The government is the outward manifestation of a State. It is an organ of the community. There can be no State without a permanent and definite organisation. A temporary and casual union of individuals does not constitute a State. Salmond writes: "Political or civil power is the power vested in any person or body of persons of exercising any function of the State by his or their decision to set in motion the forces of the State for a particular purpose. All the persons with such power considered together constitute the government of that State and are the persons through whom the State as a whole acts." The government is divisible into three great departments—the legislature, the executive and the judiciary.

(4) Another essential element of the State is sovereignty. According to Salmond: "Sovereignty or supreme power is that which is absolute and uncontrolled within its own sphere." It is this element of sovereignty which distinguishes the State from government. The sovereign is supreme both externally and internally. There is no power above it.

## Functions of the State : Primary and Secondary

Salmond divides the functions of the State into two parts : primary or essential functions and secondary functions. As regards primary functions, those are war and the administration of justice. The fundamental purpose and end of political society is defence against external enemy and the maintenance of law and order within the country. A study of the various writers shows that these two functions are considered to be essential although there are other functions which are considered to be desirable. Herbert Spencer writes : "The primary function of the State or of that agency in which the powers of the State are centralised is the function of directing the combined actions of the incorporated individuals in war. The first duty of the ruling agency is national defence. What we may consider as measures to maintain inter-tribal justice are more imperative and come earlier than measures to maintain justice among individuals. Once established, the secondary function of the State goes on developing and becomes a function next in importance to the function of protecting against external enemies. With the progress of civilization, the administration of justice continues to extend and becomes more efficient. Between these essential functions and all other functions, there is a division which, though it cannot in all cases be drawn with precision, is yet broadly marked."

The primary functions of war and administration of justice are essentially the same and they help individuals to maintain their rights in society. However, there are certain differences in the two functions. The administration of justice requires the interposition of a judicial decision but in the case of war, the State acts extra-judicially without awaiting any such decision. Judicial force is usually regulated by law but extra-judicial force recognizes no law. It is the will of those who exercise it. There is no law in war. Martial law is merely the will of the commanding officer. Another distinction is that judicial force is commonly exercised against private persons but extra-judicial force is exercised against States. However, it is possible that the State may wage war against its own subjects or against pirates or other persons who do not constitute a political society. Another difference is that the machinery of justice is usually employed against internal but force is used against external enemies. The administration of

justice is usually against the persons completely in the power of the State and its force is usually latent. Extra-judicial justice is not armed with such obviously overwhelming force.

As regards secondary functions, there are two main functions in this class and those are legislation and taxation. These functions are necessary for the welfare of citizens. Every State is becoming a welfare State and the whole life and activities of the community have come to be regulated and governed by the State. The secondary functions of the State have increased State activity. In Communist countries, the whole of the economic structure is a branch of public administration.

### **Unitary and Composite States**

A unitary State is one which is not made up of territorial divisions which are States themselves. The Central Government is all-powerful. A composite State is one which is itself an aggregate or group of constituent States. Salmond classifies composite States as imperial, federal or confederate according to whether in legal theory there exists a Central Government from which the authority of all others is derived.

According to Nathan, a federation is "an aggregate of small States which, while each retaining its separate identity, are united together for defined common purposes in a union which, theoretically at least, is indissoluble." Prof. Dicey defines a federal State as "a political contrivance intended to reconcile national unity with the maintenance of State rights." Prof. MacIver writes that the distinctive feature of a federation "is the formal division of sovereign powers between the constituent or part States and the larger State which they together compose." According to Roscoe Pound: "A federal polity is necessarily a legal polity. Only a Constitution which has the supreme law of the land can hold the whole and parts in their appointed spheres. Also it is a polity requiring a separation or distribution of powers, since concentration of all government powers anywhere not merely threatens the regime of balance, it cuts off means of preventing the balance when it is disturbed. While a Constitution has a purely political side, as setting up a frame of government, it must be, especially in a federal polity, a legal document, a body of authoritative precepts, rules, principles and standards enforceable and enforced as the supreme law."



There is fundamental difference between a federation and confederation. Hall writes: "A confederation is a union strictly of independent States which consent to forego permanently a part of their liberty of action for certain specific objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity". In a federation, the units are merged into the federal government and a new State is created from the legal point of view. A federation is a permanent form of union and the units cannot leave the same. According to Garner, the component members of a confederation "are free to withdraw at will and thus dissolve the confederation, and the confederating authorities have no constitutional power to restrain a disaffected member and compel it to remain in the confederation against its will". A confederation is a temporary union for a temporary purpose and when that is achieved the confederation is dissolved. However, a federation is a permanent union for an indefinite period.

### **The State and Law**

The relation between the State and law is very close and intimate. The State manifests or expresses itself through law and law has its importance or sanctity because it has the sanction of the State. There are *three theories* with regard to the relationship between State and law.

(1) The first theory is that the State is superior to law and creator of law. Salmond writes: "It is in and through the State alone that law exists." Austin defines law as a command of the sovereign. Only the sovereign has the power to make law and he himself is not bound by it. The subject cannot have any right against the sovereign. Rules which have not been made by the State are not law. International law is not law. It is merely "positive morality".

There was a reaction against this theory. It was contended that law is anterior to the State and is not always made by the State. There was a further reaction when the Nazis and Fascists came to power in Germany and Italy. What they advocated was that law is the will of the leader of the nation. Law is merely an instrument for the prosecution and fulfilment of State policy and is not a check on it. Certain rights have been guaranteed to

citizens in democratic countries and those are considered to be binding on the State. However, those rights can be amended, curtailed or modified by the State. The prevalent view is that the State is not only the maker of law but also superior to it.

(2) The second theory is that law is more important than the State and the State is bound by it. Law is anterior to the State. Laski writes: "The rule of law is, clearly, independent of the State and is, indeed anterior to it." Miller observes: "Law, like language, springs from the society itself and one of its first works is the creation of the State—the greatest of corporations—for the enforcement of rights and duties in accordance with law. The State makes laws but does not create chemical relations" According to Krabbe, the source of law is the subjective sense of the right in the community. The sovereign is not the source of law. It is the community that expresses itself through the organs of the government. Jellinek says that although the State creates law, it is bound by it. It submits to law voluntarily. Jellinek describes it as the theory of auto-limitation.

(3) The third theory is that the State and law are one and the same thing. They merely indicate legal order. Kelsen is one of the advocates of this view. According to him, the terms State and law are the same thing. These two terms are used because we look from two different angles. When we think in terms of rules, we call it State. When we think in terms of the institution created by those rules, we call it State. There is no difference between law and State. Kelsen's view has been criticised on a number of grounds. Miller observes: "The identification of law with the State is like the identification of church and State or religion and the State."

The different theories about the relationship of law and State have their own merits. The State bound by some fundamental law is not an impossibility. It is possible that in future, law may be considered more fundamental than the State.

### **Sovereignty**

In its popular sense, the term sovereignty means supremacy or the right to demand obedience. A sovereign State is one which is subordinate to no other. It is supreme over the territory under

its control. It issues orders which all men and all associations within its territory are bound to obey. Its independence in the face of other communities is the mark of external sovereignty. Its power to exact obedience from its members is the mark of internal sovereignty. Sovereignty is the chief attribute of statehood.

In ancient times, there was no concept of sovereignty as it is understood in modern times. The concept of State sovereignty came into being after the Middle Ages and developed during the Reformation and Renaissance. The view of Machiavelli was that politics is a secular science. The State is absolute and an end in itself. There are no restraints on its powers, whether of the church or of natural law. The power of the ruler over his subjects is absolute.

Bodin was the first writer who used the word sovereign by which he meant the absolute and perpetual power within a State. According to him, the ruler is the source of all laws. He has the absolute power of law-making although the law of nature makes him respect proprietary rights and keep faith with another ruler.

The theory of sovereignty was further developed by Hobbes. According to him, the sovereign is absolute and not bound by anything. Its power extends over all matters within the State, including religion.

The theory of sovereignty was given in a very elaborate and systematic form by Austin. According to him, the sovereign is not in the habit of obedience to any political superior and he commands habitual obedience from the bulk of his subjects. Sovereignty is indivisible, unlimited and illimitable.

### *Salmond*

The view of Salmond is that every political society involves the presence of sovereign authority. It is not necessary that sovereignty in all cases be found in its entirety within the confines of the State itself and may, wholly or partly, be external to the State. In the case of a dependent or semi-sovereign State, sovereign power is vested wholly or in part in the superior State. Sovereignty need not mean unlimited supremacy as supposed by Austin. An authority may be sovereign within its sphere and in

that sphere its power is uncontrolled. The ambit of this sphere need not be unlimited. Austin erroneously thought that if authority is restricted and confined to particular limits, it cannot be sovereign. According to Salmond, Austin's error lies in confusing the limitation of power with its subordination. The authority confided to a particular organ should be regarded as sovereign if within its own sphere it acknowledges no higher power, though its authority may not extend to other spheres. A sovereign within its power is not a contradiction in terms. When Salmond says that sovereignty may be limited, it is not suggested that sovereign power may be legally controlled within its own sphere because that would be a self-contradictory proposition. What he maintains is that the province of sovereignty may have legally determined bounds. Within its own ambit, sovereign power must undoubtedly be unfettered, but the Austinian view that this ambit is infinite and has no assignable limits is rejected by Salmond. Legislative power itself may be divided between two coordinate legislatures, each dealing exclusively with certain topics of legislative power.

### *Dicey*

The view of Dicey is that there are two kinds of sovereigns, legal sovereign and political sovereign. Parliament is the legal sovereign because it has the supreme power of law-making. Behind the legal sovereign, there is the political sovereign which is the electorate. The legal sovereign acts in accordance with the wishes of the political sovereign. During the time when the House of Commons is dissolved and elections have not taken place, sovereignty vests directly in the electorate. When the elections are held and the Parliament has been constituted, sovereignty directly vests in the legal sovereign and the political sovereign remains sovereign only indirectly. There must be harmony in the views of the legal sovereign and the political sovereign in the interests of political sovereignty.

### *Jethrow Brown*

The view of Jethrow Brown is that the State, as a corporation, is sovereign. It acts through various organs and agents for the achievement of its corporate purpose. The sovereign is not a person or a group of persons, distinct and separate from the

community. The community as such is the sovereign and it expresses its general will through the organs of government.

### *Kelsen*

The view of Kelsen is that there can be no concept of sovereignty distinct and separate from and above the law. The State is simply a legal order. The only meaning that can be given to State sovereignty is that legal order is a unity distinct from and independent of other similar legal orders.

### *Duguit*

Duguit rejects the idea of State sovereignty. According to him, social solidarity is the end of all human institutions, including the State. The State has no absolute and unlimited powers. It is bound by the rule of social solidarity. State sovereignty is a meaningless term as the State has no supreme and superior powers.

### *Pluralists*

The Pluralists reject the idea of State sovereignty. According to them, the State is one of the many associations an individual joins for the satisfaction of his needs. The State is only one of the many associations. Associations compete among themselves for the allegiance of human beings. The State cannot demand exclusive allegiance from the people.

### *Marxist view*

The Marxist view is that the State reflects the dominance of one class over the other classes of society. The powers of the State are exercised to protect the interests of the class which has instruments of production in its hands. Sovereignty or State power is only for the protection of that class. The State shall wither away when classes are abolished. In that case, there will be no question of State sovereignty.

For certain reasons, the authority of the State has increased tremendously in modern times. There is the perpetual danger of war. There is a race of armaments going on in the world. There is an atmosphere of cold war. All these factors have resulted in uncontrolled power of the State. However, there are certain limitations on the sovereignty of State. International law is an

external check on the absolute power of the State. There is also a growing demand in the world for the decentralisation of the powers of the government. There is a demand for devolution of power, both regional and functional. There is a growing demand for individual freedom and freedom of association. "Whatever may have been the case in the past, the theory of sovereignty seems at the present day to be one of the greatest stumbling blocks in the path of international progress. It is hardly too much to say that ever since that Great War the world has been struggling to escape from the theory of sovereignty in international affairs—from its jealousies, its rivalries, its preposterous pretensions and its apprehensions and to build up out of the ruins left by the War, a more wholesome theory of international society."

### *Austin's Theory of Sovereignty*

The nature of sovereignty is explained by John Austin in these words: "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society, including the superior, is a society political and independent. To that determinate superior, the other members of the society are dependent. The position of its other members towards the determinate superior is a state of subjection or a state of dependence. The mutual relation which subsists between that superior and them may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection."

Prof. Laski says that there are three implications of the definition of sovereignty given by Austin. The State is a legal order in which there is a determinate authority acting as the ultimate source of power. Its authority is unlimited. It may act unwisely and dishonestly but there is no limit on the exercise of its power. From the legal point of view, the character of the action is immaterial. If the order comes from the sovereign, that order is lawful. Command is the essence of the law. Law is in the form of "You must do certain things" or "You must not do other things" and failure in either direction is punished.

According to Austin, in every independent political society, there is a sovereign power. The chief characteristic of sovereignty

lies in the power to exact habitual obedience from the bulk of the members of the society. Sovereignty is the source of law. Every law is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme. Law is the will or command of the sovereign. Sovereign is that authority in the State which can make and unmake any and every law. The power of the sovereign is legally unlimited.

Austin admits that the sovereign power may have *de facto* limitations. The effective power of the sovereign is dependent on two factors. The first factor is the coercive force which the sovereign has at his command. The second factor is the docile disposition of the people. As these two things have practical limits, sovereignty is also limited *de facto*. What Austin denies is that the sovereign power can be limited *de jure*. By definition, the legal sovereign is that person or body to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power of laying down general rules or isolated commands, whose authority is that of the law itself. As the sovereign is the source of law, the view of Austin is that there can be no legal limits to the power of the sovereign. The power of the sovereign is indivisible. It cannot be legally limited. It cannot be divided also. According to Austin, there can be only one sovereign in the State. The totality of sovereign power is vested in one person or a body of persons.

The legal omnipotence of the British Parliament is unique. According to De Lolme: "It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man and a man a woman." The only limits to the legislative power of Parliament are physical limits.

Lord Bryce writes: "The British Parliament can make and unmake any and every law, change the form of government or the succession to the Crown, interfere with the course of justice, extinguish the most sacred rights of the citizens....and it is, therefore, within the sphere of the law, irresponsible and omnipotent."

Prof. Dicey gives the following instances as illustrations of the exercise by Parliament of its supreme legislative authority:

(1) The Union of Scotland Act, 1707 contained certain provisions which were expressed to have continuance for ever, but some of them were repealed later on. (2) The Union of Ireland Act, 1800 provided that the Churches of Ireland and England should be united into one Protestant Episcopal Church of England and Ireland and the united church should remain in force for ever. However, the Irish Church Act, 1869 disestablished the Church of England in Ireland. (3) Under an Act of 1694, the duration of British Parliament was limited to three years. This Act was in force in 1716 and a general election could not be deferred beyond 1717. However, the Septennial Act was passed which extended the duration of Parliament from three to seven years and the powers of the sitting House of Commons were prolonged for four years.

Dr. Jennings points out that all the instances given by Dicey relate to the subject-matter of legislation and not the method of legislation. Section 4 of the Statute of Westminster, 1931 provides that the British Parliament cannot legislate for a Dominion except with its consent.

The view of Salmond is that the existence of *de facto* limitations proves the possibility of legal limitations. To quote him: "A law is only the image and reflection of the outer world seen and accepted as authentic by the tribunals of the state... If the courts of justice habitually act upon the principle that certain functions or forms of activity lie outside the scope of legal sovereign power as recognised by the Constitution, then that principle is by virtue of judicial application a true principle of law and sovereignty."

In the British Constitution, the legislative authority alone resides in Parliament while executive authority resides in the Crown. In law, the executive power of the Crown is sovereign, being absolute and uncontrolled in its own sphere. Austin does not admit this and says: "The powers of the King detached from the body (Parliament) are not sovereign powers but are simply or purely subordinate; or if the King or any part of its members considered as detached from that body, be invested with political power, that member as so detached is merely a minister of the body, or those powers are merely emanations of its sovereignty". Salmond does



not accept the view of Austin and writes : "No law passed by the two Houses of Parliament is operative unless the Crown consents to it. How then can the legislature control the executive ? A power over a person which cannot be exercised without that person's consent is no power over him at all. A person is subordinate to a body of which he is a member only if that body has power to act notwithstanding his dissent." In legal theory, the Executive under the British Constitution cannot be regarded as subordinate to the legislature. The conclusion of Salmond is that the British Constitution recognises sovereign executive no less than a sovereign legislature.

Salmond points out that till 1911, a Supreme Judicature was recognised by the British Constitution. The House of Lords in its judicial capacity as a final court of appeal was sovereign. Without its consent, its judicial powers could not be impaired or controlled. Thus, the House of Lords was the supreme judicial power. However, the Parliament Act of 1911 made it possible for a bill passed by the House of Commons to become law even without the concurrence of the House of Lords. By that Act, the power of the House of Lords over general legislation was curtailed practically to a suspensive veto of two years. Thus, the House of Lords was reduced to a position of subordination and could not be regarded as a sovereign organ.

According to the Austinian theory, sovereignty in a federal State is to be sought in the ultimate power which can alter the Constitution. Article V of the American Constitution provides for constitutional amendment. That amendment is to be proposed by a two-thirds majority of the Congress and ratified either by the legislatures of three-fourths of the States or by conventions in three-fourths of the States. An amendment may also be proposed by a constitutional convention called on the application of the legislatures of two-thirds of the States and ratified by the legislatures of three-fourths of the States or by conventions in three-fourths of the States.

It is clear that the constitution-amending body is fettered in coming to decision by very restrictive rules as to majorities. These restrictions are provided to ensure that the Constitution does not become so readily alterable. However, a sovereign thus

trammelled would be more or less a contradiction in terms. Moreover, the constitution-amending body comes into operation only on very exceptional occasions. Lord Bryce writes: "Is there not something unreal and artificial in ascribing sovereignty to a body which is almost always in abeyance?"

Even if it is assumed that the constitution-amending body is the sovereign, the question arises whether its powers are legally unlimited. Prof. Sidgwick observes: "It has legal limits of great importance because it (the constitution-amending body) can operate only when the legal rules determining its structure and procedure are satisfied." Moreover, no state can be deprived of its equal voting suffrage in the Senate without its consent. The result is that even the constitution-amending body has legal limitations upon its power.

Austin's theory of indivisible sovereignty breaks down in the case of federal States. Sovereignty is divided into legislative, executive and judicial sovereignty. This division is taken as axiomatic in a federal Constitution. These three branches are independent of one another in federal States

The view of Lord Bryce is that Austin's theory of sovereignty is not applicable to federal Constitutions. In the United States, the Congress can legislate on federal matters only. The residuary legislative power is with the State legislatures. To quote Bryce: "Each legislature, therefore, has only a part of the sum total of supreme legislative power. The sovereignty of each of these authorities will then be to the lawyer's mind, a partial sovereignty. But it will nonetheless be a true sovereignty sufficient for the purpose of the lawyer." The conclusion of Lord Bryce is that "legislative sovereignty is divisible, that is, different branches of it may be concurrently vested in different persons (or bodies), coordinate altogether, or coordinate partially only, though acting in different spheres."

Under the Indian Constitution, Article 53 provides that the executive power of the Indian Union is vested in the President of India. Legislative power resides in Parliament which comprises the President, the Council of States and the House of the People. The Constitution can be amended only when the amending bill after being duly passed as required by Article 368, has received

the assent of the President. The powers of the President as supreme executive cannot be impaired without his consent. In the executive sphere the President is supreme and may be regarded as the executive sovereign. As the powers of the Supreme Court can be impaired without its consent, there is no judicial sovereign in the Indian Constitution.

It is suggested that sovereignty may be located in the constitution-amending body. Austin tried to locate sovereignty in the United States in this way. However, that cannot be done in India whose Constitution does not prescribe only one procedure for amending the Constitution. Some amendments can be made by Parliament itself without the concurrence of the States. Some amendments mentioned in the Proviso to Article 368 of the Indian Constitution require in addition ratification by the legislatures of one-half of the States. As there is not one constitution-amending body for all purposes, it is not the repository of sovereign power. Moreover, the constitution-amending body functions rarely and it is artificial to ascribe sovereignty to it.

While delivering the V. S. Srinivasa Sastri Endowment Lectures in 1955, K. M. Munshi observed: "What are the implications of the sovereignty with which our Republic is vested? Sovereignty has two aspects: one external, that is, in relation to other States enjoying sovereign powers, and the other internal, that is, in relation to its own citizens. The idea that sovereignty is unlimited or to use the words of Hobbes, indivisible, unlimited and illimitable is as untrue in theory as in practice. The idea was borrowed by nation-states from the Divine Right of Kings and has been leading the world to endless misery and confusion during the last three hundred years. In the past, the sovereignty of a State was always hedged in by treaties, conventions and international law. During recent years when the world has shrunk fast on account of science, external sovereignty as an illimitable power has no sense.

"India, in spite of being a sovereign Republic, is limited in its external relations by its membership of the Commonwealth, by its membership of the United Nations Organisation, by the express and implied alliances which it maintains with several nations, by the financial and military difficulties which preclude

every nation in the world from doing what it likes, and above all, by the increasing pressure of international opinion. What is true of India is true of all nations. Today even the two most powerful nations of the world find it difficult to do what they want to do. The pressure of the world opinion is rising and would, in the near future, make external sovereignty anything but real. A leading school of jurists is of the opinion, and rightly, that only the universal State could be sovereign, but then its external relations could only be directed to the Moon or Mars. External sovereignty can therefore be defined as the power of a State to maintain its internal sovereignty as it likes, to develop and exploit its resources for its own advantage, to resist direct foreign interference in its own affairs, to frame its own foreign policies and choose its allies "

Sir Henry Maine was very critical of Austin's theory of sovereignty. His view was that sovereignty did not reside in a determinate human superior. To quote him: "A despot with a disturbed brain is the sole conceivable example of such sovereignty." Maine emphasised the existence of "vast mass of influences which we may call, for shortness, moral, that perpetually shapes, limits or forbids the actual direction of the forces by its sovereign." Referring to Maharaja Ranjit Singh of the Punjab, Maine pointed out that the Maharaja "could have commanded anything; the smallest disobedience to his command would have been followed by death or mutilation " In spite of that, the Maharaja never "once in all his life issued a command which Austin could call a law. The rules which regulated the life of his subjects were derived from their immemorial usages and these rules were administered by domestic tribunals in families or village communities." The conclusion of Maine was that even a Maharaja like Ranjit Singh could not issue a command which was opposed to the customs, usages and religious beliefs of the people. That was so not only in the East but also in the West where also no sovereign could disregard "the entire history of the community, the mass of its historical antecedents which in each community determine how the sovereign shall exercise or forbear from exercising his irresistible coercive power."

According to Austin, the sovereign possesses unlimited powers, but experience shows that there is no power on earth which can

wield unlimited powers. The reason is that the State or the sovereign acts through law which can regulate only the external actions of human beings and is helpless to regulate their internal actions. Whatever the Government might do, it cannot control the morality of the people, the beliefs of the people, their religion or the public opinion. The State cannot control the internal lives of the people. Hence the sovereign does not possess unlimited powers.

Bluntschli writes that "the State as a whole is not almighty, for it is limited externally by the rights of other States and internally by its own nature and by the rights of individual members."

According to Leslie Stephen, sovereignty is limited both from within and without: "from within because the legislature is the product of a certain social condition and determined by whatever determines society, and from without because the power of imposing law is dependent upon the instinct of subordination which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal but legislatures must go mad before they could pass such a law and subjects be idiotic before they could submit to it." Again, "as there is in nature no such thing as a perfect circle or a completely rigid body, or a mechanical system in which there is no friction or a state of society in which men act simply with a view to gain, so there is in nature no such thing as an absolute sovereign."

Professor Laski has criticised the theory of unlimited sovereignty on many grounds. He points out that "no sovereign has anywhere possessed unlimited power and the attempt to exert it has always resulted in the establishment of safeguards." Even the British Parliament does not enjoy absolute powers in actual practice. Legally, the King-in-Parliament may outrage public opinion, but practically it can do so only on the implied condition that it ceases, as a consequence, to be the King-in-Parliament. The other associations within the State are no less sovereign than the State itself. The interests of humanity demand a limited sovereignty. To quote him: "Externally surely, the concept of absolute and independent sovereign State which demands an unqualified allegiance to government from its members and enfor-

ces that allegiance by the power at its command, is incompatible with the interests of humanity. Our problem is not to reconcile the interests of humanity with the interests of England; our problem is so to act that the policy of England naturally implies the well-being of humanity."

Critics point out that "legally, an autocratic Tsar may shoot down his subjects before the Winter Palace at Petrograd, but morally it is condemnation that we utter. There is, therefore, a vast difference between what Dean Pound has admirably called 'Law in Books' and 'Law in Action'."

It is not only impossible to exercise unlimited powers, but it is also undesirable to give unlimited powers to anybody. History tells us that whenever any King or Queen was given unlimited powers over the people, the people suffered. Both their lives and property were unsafe. They could not enjoy their liberty. The whims of one man prevailed and there was no certainty about anything. Moreover, unlimited sovereignty or the exercise of unlimited powers not only destroys those over whom that power is exercised but also destroys ultimately the wielders of unlimited power. As a result of persecution at the hands of the autocrat, the grievances of the people multiply and ultimately they revolt against him and pull him down.

The conclusion is that Austin's view of sovereignty is not applicable to the States in modern times. The definition served its purpose during the nineteenth century but now it does not serve its purpose.

### SUGGESTED READINGS

- |                     |  |
|---------------------|--|
| Brown, W. J.        | : <i>The Austinian Theory of Law</i> , 1906.                   |
| Bryce, Lord         | : <i>Studies in History and Jurisprudence</i> .                |
| Eastwood and Keeton | : <i>The Austinian Theories of Law and Sovereignty</i> , 1929. |
| Finch, O. D.        | : <i>Introduction to Legal Theory</i> .                        |
| Gray                | : <i>The Nature and Sources of Law</i> .                       |
| Jennings            | : <i>The Law and the Constitution</i> .                        |
| Maine, Henry        | : <i>Early History of Institutions</i> .                       |
| Salmond, J. W.      | : <i>Jurisprudence</i> .                                       |
| Willoughby          | : <i>Nature of the State</i> .                                 |
| Wilson              | : <i>The State</i> .   |

## VII

# ADMINISTRATION OF JUSTICE

### Importance of justice

In the words of Prof. Sidgwick: "In determining a nation's rank in political civilisation, no test is more decisive than the degree in which justice as defined by the law is actually realised in its judicial administration." Lord Bryce writes: "There is no better test of the excellence of a government than the efficiency of its judicial system." George Washington said: "Administration of justice is the firmest pillar of government. Law exists to bind together the community. It is sovereign and cannot be violated with impunity." Salmond and Roscoe Pound have emphasized the importance of justice in their definitions of law. They have defined law in terms of justice. According to Salmond: "Law may be defined as the body of principles recognised and applied by the State in the administration of justice." Roscoe Pound observes: "Law is the body of principles recognised or enforced by public and regular tribunals in the administration of justice." Blackstone wrote: "Justice is not derived from the king as his free gift but he is the steward of the public to dispense it to whom it is due. He is not the spring but the reservoir from whence right and equity are conducted by a thousand channels to every individual."

### Administration of justice

The most essential functions of a State are primarily two: war and administration of justice. If a State is not capable of performing either or both of these functions, it cannot be called a State. According to Salmond, the administration of justice implies the maintenance of right within a political community by means of the physical force of the State. It is a modern and civilised substitute for the primitive practice of private vengeance and violent self-help. The definition of Salmond has been criticised on the ground that it is not the force of the State alone that

secures the obedience of law. There are a number of other factors such as the social sanctions, habit and convenience which help in the obedience of law. In civilised societies, obedience to law becomes a matter of habit and in very rare cases the force of the State is used to secure it. The supporters of the definition of Salmond point out that if the force of the State is not used in all cases to secure obedience, it does not mean that the control of the State has disappeared. It merely indicates the final triumph and supremacy of the control of the State.

### *Necessity of Administration of Justice*

In the words of Jeremy Taylor: "A herd of wolves is quieter and more at one than so many men, unless they all have one reason in them or have one power over them" Spinoza writes: "Those who persuade themselves that a multitude of men can be induced to live by the rule of reason are dreamers of dreams and of the golden age of poets." Hobbes says that without a common power to keep them all in awe, it is not possible for individuals to live in society. Without it, injustice is unchecked and triumphant and the life of the people is solitary, poor, nasty, brutish and short.

Salmond points out that men do not have one reason in them and each is moved by his own interests and passions. The only alternative is one power over men. Man is by nature a fighting animal and force is the *ultima ratio* of all mankind. Without a common power to keep them all in awe, it is impossible for men to cohere in any but the most primitive form of society. Without it, civilisation is unattainable. However orderly a society may be, the element of force is always present and operative. It may become latent but still exists. A society in which the power of the State is never called into actual exercise does not mark the disappearance of the control of the government but its final triumph and supremacy. It is suggested that force as an instrument for the coercion of mankind is merely a temporary and provisional incident in the development of a perfect civilisation. To a large extent already, the element of force has become merely latent and for the most part it is sufficient for the State to declare the rights and duties of its subjects. This is clear from the increasing popularity of the cases for mere declaration which do not seek any other



relief except the declaration of law or the rights of the parties. The force of public opinion is a valuable support and even indispensable for a system of law because without it there can be no stability and permanence. However, public opinion alone is no substitute for legal sanctions. The influence of public censure is a very weak one. The influence of the national conscience, unsupported by the force of the State, can be counteracted by small societies or associations possessing separate interests and separate antagonistic consciences of their own. A man cares more for the opinion of his friends and immediate associates than for the opinion of all the world. The censure of ten thousand may be outweighed by the approval of ten. The honour of thieves finds its sanction and support from those belonging to their profession. Social sanction is an efficient instrument only if it is associated with and supplemented by the concentrated and irresistible force of the community. Force is necessary to coerce the recalcitrant minority and prevent them from gaining an unfair advantage over the law-abiding majority in a State. The conclusion is that the administration of justice with the sanction of the physical force of the State is unavoidable and admits of no substitute.

### *Origin and Growth of Administration of Justice*

The origin and growth of administration of justice is identical with the origin and growth of man. The social nature of man demands that he must live in society. While living so, man must have experienced a conflict of interests and that created the necessity for providing for the administration of justice.

To begin with, every individual had to help himself to punish the wrongdoer. Personal vengeance was allowed. He avenged himself upon his enemies by his own hand, probably supported by the hands of his friends and kinsmen where necessary. At that stage, every man carried his life in his hands. He was liable to be attacked at any time and he could resist by overpowering his opponent. In those days, every man was a judge in his own cause and might was the sole measure of right. There was no guarantee that crime would certainly be punished and that also in proportion to the gravity of the crime. Very often one crime led to another. Not only an individual was involved, even the

members of his family and tribe could be the victims of retaliation. There were group conflicts and tribal conflicts. Blood feuds were common. When blood feuds became disastrous, primitive societies provided for the payment of some money or its equivalent as a compensation to the victim of the crime or the relatives of the victim. The system of compensation was developed until a regular sliding scale was fixed. In the case of murder, the vengeance of the relatives of the deceased could be bought off by paying blood money according to the importance of the victim.

The second stage in the history of administration of justice started with the rise of political States. However, those States were not strong enough to regulate crime and inflict punishment on the criminals. The law of private vengeance and violent self-help continued to prevail. The State merely regulated private vengeance and violent self-help. The State also prescribed rules for the regulation of private vengeance. The State enforced the concept of "a tooth for a tooth", "an eye for eye" and "a life for a life". The State provided that a life shall not be taken for a tooth or a life for an eye. Vengeance was not totally abolished in the Anglo-Saxon period of the history of England but was merely restricted and regulated.

With the growth of the power of the State, the State began to act as a judge to assess liability and impose penalty. It was no longer a regulator of private vengeance. It substituted public enquiry and punishment for private vengeance. The civil law and administration of civil justice helped the wronged and became a substitute for the violent self-help of the primitive days. The modern administration of justice is a natural corollary to the growth in power of political State.

### **Advantages and Disadvantages of Legal Justice**

As regards advantages, legal justice ensures uniformity and certainty in the administration of justice. Everybody knows what the law is and there is no scope for arbitrary action. Even the judges have to give decisions according to the declared law of the country. As law is certain, citizens can shape their conduct accordingly. Another advantage is that there is impartiality in the administration of justice. Judges are required to give their

decisions according to the pre-determined legal principles and they cannot go beyond them. Law is not for the convenience of the judges or for any particular individual. Law is already laid down and judges have to act accordingly. It is in this way that impartiality is secured in the administration of justice. In the words of Chief Justice Coke: "The wisdom of law is wiser than any man's wisdom." Judges can avail of the wisdom accumulated during the last many generations. Legal justice represents the collective wisdom of the community and that is always to be preferred to the wisdom of any one individual.

There are certain disadvantages of legal justice. One disadvantage is that it is rigid. Law has already been laid down in precedents. It is not always possible to adjust it to the changing needs of society. Society may change more rapidly than legal justice and may result in hardship and injustice in certain cases. Judges act upon the principle that "hard cases should not make bad law". Another defect of legal justice is its formalism or technicalities. Judges attach more importance to legal technicalities than they deserve. They give importance to form than to substance. Another defect of legal justice is that it is complex. Modern society is becoming more and more complicated and if law is to serve its needs, it has to be complicated. Efforts are made from time to time to codify or simplify the legal system but very soon law becomes complicated. Sir John Salmond concludes: "The law is without doubt a remedy for greater evils, yet it brings with it evils of its own."

### **Public Justice**

Public justice is that which is administered by the State through its own tribunals. Private justice is distinguished as being justice between individuals. Public justice is a relation between the courts on the one hand and individuals on the other. Private justice is a relation between individuals. *X* borrows money from *Y* and private justice demands that he should pay the same as promised. If he does not do so, *Y* has the right to go to a court of law to force *X* to pay the same. If *Y* does so, it is a case of public justice. Private justice is the end for which the courts exist and public justice is the instrument or means by which courts fulfil that end. Private persons are not allowed to take the law

into their hands. Even if a wrong has been done to them, they must refrain from helping themselves. There is no place for force in private justice. That can be used only in the case of public justice. To quote Salmond: "It is public justice that carries the sword and the scales and not private justice"

### **Justice according to Law**

In modern times, what is given by the courts to the people is not what can really be called justice but merely justice according to law. Judges are not legislators and it is not their duty to correct the defective provisions of law. Their only function is to administer the law of the country. They are not expected to ignore the law of the country. It is rightly said that "in the modern State, the administration of justice according to law is commonly taken to imply recognition of fixed rules".

A few illustrations may be given to show what we understand by justice according to law. A creditor has to realise some money from a debtor. However, he files a suit after the lapse of three years. Equity may be on his side, but his suit must fail on account of the law of limitation which demands that a suit must be filed within three years. Likewise, a person may have actually committed a murder. He may confess his guilt before a police officer who is an honest man. However, he does not make a confession before a magistrate. If he is convicted on the basis of his confession before the police officer, his conviction has to be set aside as it is opposed to the law of the country. Even if a guilty person escapes, judges are not bothered about it. They do not play and are not expected to play the role of legislators. If law is defective, it is the duty of the people to demand from their legislators to alter the same. However, so long as a particular law is on the statute book, the same has to be enforced unmindful of the consequences. Law may be blind and therefore justice becomes blind, but there is no help for it. Judges are expected to give justice according to the law of the country and not according to what they consider to be just under the circumstances.

### **Civil and Criminal Justice**

A rough distinction between crimes and civil wrongs is that crimes are public wrongs and civil wrongs are private wrongs

Blackstone writes: "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community and are distinguished by the harsher appellation of crimes and misdemeanours." A crime is an act deemed by law to be harmful to society in general. Murder injures primarily the particular victim but its disregard of human life does not allow the same to be a matter between the murderer and the family of the murdered. Those who commit such acts are proceeded against by the State and they are punished if convicted. Civil wrongs such as a breach of contract or trespass to land are deemed to infringe only the rights of the individual wronged and not the society in general. The law leaves it to the victim to sue for compensation in the courts.

English law has certain features which prevent us from drawing a clear line between crimes and civil wrongs. There are some wrongs to the State and therefore public wrongs, but still they are regarded as civil wrongs by law. A refusal to pay taxes is an offence against the State and is dealt with in a suit of the State, but it is a civil wrong in the same way as a refusal to pay money lent by a private person is a civil wrong. The breach of a contract made with the State is not a criminal offence. An action by the State for the recovery of a debt, or for damages, or for the restoration of public property, or for the enforcement of a public trust is a civil wrong although in each case the person injured and suing is the State itself. Some civil wrongs can cause greater general harm than some criminal offences. The negligence of a contractor may cause greater damage and loss than a petty theft. The same act may be a civil injury or a crime.

However, Salmond points out that from a practical standpoint, the importance of distinction lies in the difference in the legal consequences of crime and civil wrongs. Civil justice is administered according to one set of forms and criminal justice according to another set of forms. Civil justice is administered in one set of courts and criminal justice is administered in a

somewhat different set of courts. The outcome of the proceedings is generally different. If successful, civil proceedings result in a judgment for damages, or in a judgment for the payment of a debt or penalty or in an injunction or decree for specific restitution or specific performance, or in an order for the delivery of possession of land, or in a decree of divorce, or in an order of *mandamus*, prohibition or *certiorari*, or in a writ of *habeas corpus*, or in other forms of relief known as civil. If successful, criminal proceedings result in one of a number of punishments, ranging from hanging to fine or in a binding over to keep the peace, release upon probation or similar other results belonging distinctly to criminal law. However, even here the distinction is not clear — cut Criminal proceedings may result in an order against the accused to make restitution or compensation. Civil proceedings may result in an award of exemplary or punitive damages. However, the basic objective of criminal proceedings is punishment and the usual goal of civil proceedings is not punitive.

Some writers consider that the object of civil proceedings is to enforce rights, while the object of criminal proceedings is to punish wrongs. There is an element of truth in this view. Punishment is more a feature of criminal proceedings than of civil proceedings. However, punishment is not always present in criminal proceedings and not always absent in civil proceedings. A juvenile offender may be just warned and not punished in a criminal proceeding whereas in an action for torts, damages may be awarded by way of punishment. When a man disobeys an injunction of the court, he may even be punished with imprisonment in civil proceedings. Therefore, this distinction does not go to the root of the matter.

Another distinction made by some writers is that crimes are more harmful in their consequences than civil wrongs. While crimes injure the public at large, civil wrongs injure the private individual. However, this distinction cannot always be maintained. Some acts may be considered both as crimes and civil wrongs. This is so in the case of defamation. It is also not always true that crimes are more harmful than civil wrongs. Negligence of a contractor is a civil wrong but it may result in more loss of life and property than a simple assault or a petty theft which are crimes.

According to some writers, the State constitutes itself as a party to the proceedings in a crime, but in civil proceedings private individuals are parties. This distinction is also not true in all cases. There are crimes in which private individuals can be parties.

The difference between criminal justice and civil justice cannot be considered in terms of natural acts or the physical consequences of the act. The distinction lies in the legal consequences. Civil proceedings result in judgment for damages etc. while criminal proceedings result in one or a number of punishments. Though, broadly speaking, criminal justice attempts at punishment and civil justice attempts at remedy, yet to be accurate, the distinction is more in the legal consequences of the proceedings than in the intrinsic nature of the acts.

### *Purpose of Criminal Justice*

The purpose of criminal justice is to punish the wrongdoer. He is punished by the State. The question arises, what is the purpose of punishment or in other words, what is the end of criminal justice. From very ancient times, a number of theories have been given concerning the purpose of punishment. Those theories may be broadly divided into two classes. The view of one class of theories is that the end of criminal justice is to protect and add to the welfare of the State and society. The view of the other class of theories is that the purpose of punishment is retribution. The offender must be made to suffer for the wrong committed by him.

### **THEORIES OF PUNISHMENT**

There are five theories of punishment: deterrent theory, preventive theory, reformatory theory, retributive theory and theory of compensation.

(a) *Deterrent Theory (Deterrent Punishment)*:—Salmond considers the deterrent aspect of punishment to be the most important. To quote him: "Punishment is before all things deterrent and the chief end of the law of crime is to make the evildoer an example and a warning to all that are likeminded with him." A similar view was expressed by Locke when he stated that the commission of every offence should be made "a bad bargain for the offender". According to the deterrent theory of punishment, the object of punishment is not only to prevent the wrongdoer from doing a wrong a second time but also to make him an example to other

persons who have criminal tendencies. A judge once said: "I don't punish you for stealing the sheep but so that sheep may not be stolen." The aim of punishment is not revenge but terror. An exemplary punishment should be given to the criminal so that the others may learn a lesson from him. The view of Manu was that "penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have regarded punishment (*danda*) as a source of righteousness". Again, "people are in check by punishment, for it is difficult to find a man who by nature sticks to the path of virtue and this world is unable to afford sources of enjoyment through fear of punishment". Paton writes: "The deterrent theory emphasises the necessity of protecting society, by so treating the prisoners that others will be deterred from breaking the law."

The deterrent theory was the basis of punishment in England in medieval times and continued to be so till the beginning of the 19th century. The result was that severe and inhuman punishments were inflicted even for minor offences in England. In India also, the penalty of death or mutilation of limbs was imposed even for petty offences.

There is a lot of criticism of the deterrent theory of punishment in modern times. It is contended that the deterrent theory has proved ineffective in checking crime. Even when there is a provision for very severe punishments in the penal law of the country, people continue to commit crimes. In the time of Queen Elizabeth, the punishment for pickpocketing was death but in spite of that, pickpockets were seen busy in their work among the crowds which gathered to watch the execution of the condemned pickpockets. It is pointed out that with the increase in the severity of punishment, crimes have also increased. Excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel punishments. Deterrent punishment is likely to harden the criminal instead of creating in him the fear of law. Hardened criminals are not afraid of punishment. Punishment loses its horror once the criminal is punished.

Beccaria writes: "The more cruel punishments become, the more human minds hardened, adjusting themselves, like fluids,



to the level of objects around them ; and the ever living force of the passions brings it about that, after a hundred years of cruel punishments, the wheel frightens men only just as much as at first did the punishment of prison." Hobhouse expresses himself in these words: "People are not deterred from murder by the sight of the murderers dangling from a gibbet. On the contrary, what there is in them of lust for blood is tickled and excited, their sensuality or ferocity is aroused and the counteracting impulses, the aversion to bloodshed, the compunction for suffering are arrested."

(b) *Preventive Theory (Preventive Punishment)* :—Another object of punishment is preventive or disabling. The offenders are disabled from repeating the offences by such punishments as imprisonment, death, exile, forfeiture of office etc. By putting the criminal in jail, he is prevented from committing another crime. By dismissing a person from his office, he is deprived of an opportunity to commit a crime again. Paton writes: "The preventive theory concentrates on the prisoner but seeks to prevent him from offending again in the future. Death penalty and exile serve the same purpose of disabling the offender." Justice Holmes writes: "There can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed."

An example of preventive punishments is the cancellation of the driving licence of a person. As he has no licence, he is prevented from driving.

*Relation between Deterrent and Preventive Theories* :—There is a difference between deterrent and preventive theories of punishment. The deterrent theory aims at giving a warning to the society at large that crime shall not pay. Preventive theory aims at disabling the actual criminal from doing harm. The purpose of the deterrent theory is to set a lesson unto others and show that crime does not pay. This theory points out to the offender and the rest of

the world that ultimately punishment follows the crime and therefore crime should be avoided. In the case of preventive theory of punishment, the main object of punishment is to disable the wrongdoer from repeating the crime. This theory does not act so much on the motive of the wrongdoer but disables his physical power to commit the offence.

(c) *Reformative Theory*:—According to this theory, the object of punishment should be the reform of the criminal. Even if an offender commits a crime, he does not cease to be a human being. He may have committed a crime under circumstances which might never occur again. The object of punishment should be to bring about the moral reform of the offender. He must be educated and taught some art or industry during the period of his imprisonment so that he may be able to start his life again after his release from jail. While awarding punishment, the judge should study the character and age of the offender, his early breeding, his education and environment, the circumstances under which he committed the offence, the object with which he committed the offence and other factors. The object of doing so is to acquaint the judge with the exact nature of the circumstances so that he may give a punishment which suits the circumstances

The advocates of the reformative theory contend that by a sympathetic, tactful and loving treatment of the offenders, a revolutionary change may be brought about in their characters. Even the cruel hardened prisoners can be reformed and converted into helpful friends by good words and mild suggestions. Severe punishment can merely debase them. Man always kicks against pricks. Whipping will make him balk. Threat will result in resistance. Prison-hell may create the spirit of defiance of God and man. Hanging a criminal is merely an admission of the fact that human beings have failed to reform the erring citizen. Corporal punishments like whipping and pillory destroy all the finest sentiments and tenderness in man. Mild imprisonment with probation is the only mode of punishment approved by the advocates of reformative punishment.

The view of Salmond on the reformation theory is that if criminals are to be sent to prison to be transformed into good citizens by physical, intellectual and moral training, prisons must

be turned into comfortable dwelling places. There are many incorrigible offenders who are beyond the reach of reformatory influences and with whom crime is not a bad habit but an instinct and they must be left to their fate in despair. The theory of reformatory punishment alone is not sufficient and there should be a compromise between the deterrent theory and the reformatory theory and the deterrent theory must have the last word. The primary and essential end of criminal justice is deterrence and not reformation. In the past, the deterrent theory alone was considered and crime alone was taken into consideration and not other circumstances. In modern times, there is a tendency to ignore or minimise the deterrent aspect of punishment. What is required is that the value of the deterrent element must be given its proper place. In most cases, criminals are sub-normal persons and that is largely due to the fact that the fear of law has its effect on normal minds. Salmond writes "The deterrent motive should not be abandoned in favour of the reformatory altogether since the permanent influence of criminal law in this stern aspect contributes largely to the maintenance of the moral and social habits which shall prevent any but the abnormal from committing crime and also directly deter any but the sub-normal, apart from exceptional circumstances, from committing crimes."

Salmond further observes that although the acceptance of the reformatory theory alone is bound to lead to disastrous consequences, it should be extended to the treatment of other than the very young and insane persons. He refers to two objections. In the first place, law is too rough an instrument to distinguish accurately between the normal and the sub-normal. Secondly, except in extreme cases of insanity it is not clear that even in the case of abnormal persons, the deterrent effects of punishment are not effective and necessary. If a person is deficient in any way, that is hardly any ground for treating him leniently than others. Even in the case of abnormal persons, it is easier to deter them from crime by discipline than to reform them by lenient punishment. Under the circumstances, the deterrent theory must not be ignored in criminal justice. Salmond writes: "The reformatory element must not be overlooked but neither must it be allowed to assume undue prominence. To what extent it may be permitted in particular instances to overrule the requirements of a strictly deterrent

theory is a question of time, place and circumstances. In the case of youthful criminals, the chances of effective reformation are greater than in that of adults and the rightful importance of the reformatory principle is therefore greater also. In orderly and law-abiding communities, concessions may be made in the interests of reformation which in more turbulent society would be fatal to the public welfare."

In spite of the view of Salmond, a lot of emphasis is being put on the reformatory aspect of punishment in modern times. In progressive States, provision is made for the prevention of habitual offenders. Borstal schools have been set up. Provision is made for a system of probation for first offenders.

Reformation theory is being growingly adopted in the case of juvenile offenders. The oldest legislation on the subject in India is the Reformatory Schools Act, 1890 which aimed at preventing the depraved and delinquent children from becoming confirmed criminals in the coming years. It applied to children under the age of 15 years. Section 4 abolished all criminal proceedings for offences other than homicide against children. The entire responsibility of dealing with delinquent children was put on the local authority. Section 5 authorised the provincial government to establish and maintain reformatory schools. Section 6 provided that the reformatory schools must provide sufficient means of separating the inmates at night, proper sanitary arrangements, water supply, food, clothing and bedding for the youthful offenders detained therein, the means of giving industrial training to youthful offenders and proper places for the reception of youthful offenders when sick. Section 8 provided that if a youthful offender was sentenced to transportation or imprisonment, the court may direct that instead of undergoing sentence, he shall be sent to a reformatory school and detained there for a period not less than three years or more than seven years.

The Reformatory Schools Act has been extensively amended in its application to the various States by State legislatures, e.g., the Bombay Children Act, 1948, Madras Children Act, 1920, East Punjab Children Act, 1949, Uttar Pradesh Children Act, 1951, West Bengal Children Act, 1959, Assam Children Act, 1971, Bihar Children Act, 1970, Madhya Pradesh Baal Adhiniyam, 1970, Rajasthan Children Act, 1970 and Mysore Children Act, 1964.

The Government of India passed in 1960 the Children Act which applies to the Union Territories. This Act was amended in 1978. This amendment broadened the aim of the Children Act, 1960.

The Probation of Offenders Act, 1958 has been passed with a similar object in view. About this Act, the Supreme Court observed in *Rattan Lal v. State of Punjab* that the Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. The Act distinguishes offenders between 21 years of age and those above that age and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. In the case of offenders who are above the age of 21, absolute discretion is given to the courts to release them after admonition or probation of good conduct. In the case of offenders below the age of 21, an injunction is issued to the courts not to sentence them to imprisonment unless they are satisfied that, having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to release them on probation (AIR 1965 SC 444). In *Musa Khan v. State of Maharashtra*, the Supreme Court observed that this Act is a piece of social legislation which is meant to reform juvenile offenders with a view to prevent them from becoming hardened criminals by providing an educative and reformatory treatment to them by the government (AIR 1976 SC 2566).

Section 27 of the Criminal Procedure Code, 1973 provides that any offence not punishable with death or imprisonment for life committed by any person who, at the date when he appears or is brought before the court, is under the age of 16 years, may be tried by the court of a Chief Judicial Magistrate or by any court especially empowered under the Children Act, 1960, or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

Section 360 of the Code of Criminal Procedure, 1973 empowers the court to order the release on probation of good conduct or after admonition.

*Relation between Deterrent and Reformative Theories*:—There is a lot of difference between the deterrent and reformative theories. The reformative theory stands for the reformation of the convicted person but the deterrent theory wants to give exemplary punishment so that the others are deterred from following that course. The deterrent theory would like to hang the murderer so that others may not commit murders but capital punishment does not allow an opportunity to the criminal to reform himself.

The reformative theory wants to punish the criminal as little as possible and improve him as much as possible. Punishments which brutalize the criminal are discarded. It is contended that if we inflict degrading punishments on criminals, there is no scope left for their reformation. The disgrace and loss of self-respect by the criminals are serious obstacles in the way of their reformation —

In the case of habitual criminals, the deterrent theory would like to inflict as severe a punishment as possible on the ground that the previous punishments must have been inadequate and that is why the criminal committed further offences. The reformative theory is going to fail in the case of habitual offenders.

The fundamental principle of deterrent theory is that punishment should be determined by the character of the crime and too much emphasis is put on the crime and not on the criminal. Ferri writes in *Criminal Sociology*: "To the classical criminologists, the person of the criminal is an entirely secondary element. . . . He is an animated manikin on the back of which the judge places the number of his section of the Penal Code." The reformative theory requires that the circumstances under which the offence was committed must be taken into consideration and every effort should be made to give a chance to the criminal to improve himself in the future.

The deterrent theory may impose the punishment of imprisonment, fine or even whipping and death penalty. According to the reformative theory, excepting imprisonment, the other modes of punishment are barbaric. Imprisonment and probation are the only important instruments available for the purpose of a purely reformative system.

The question arises whether a system of penal code is possible which has reformation as the sole standard of punishment. The view of Salmond is that there are in the world men who are incurably bad. With them, crime is not so much of a bad habit as an ineradicable instinct and the reformatory theory would be helpless in the case of such persons. According to him, the perfect system of criminal justice is based on neither the reformatory nor the deterrent principle. What is required is a compromise between the two and in that also the deterrent principle must have the predominant influence. The extreme inclination towards the reformatory theory may be as dangerous as the complete acceptance of the deterrent theory. It is true that previously too much attention was paid to the crime and not to the criminal. It is also true that criminals generally are not ordinary human beings. They are mentally diseased and abnormal human beings. However, if all the murderers are considered as innocent and given a lenient treatment, even ordinary sane people may be tempted to commit crimes in view of the lenient attitude of law towards crime. The reformatory theory may be effective in the case of the very young and completely insane offenders, but the deterrent element in punishment must have the predominant influence.

Previously, criminal law was barbarous and death penalty was inflicted in a large number of cases regardless of the circumstances in which the crime was committed. In *R. v. Haynes*, the accused was charged with the murder of a woman with whom he was on very friendly terms up to the commission of the offence. Probably the offence was committed under some uncontrollable impulse or moral insanity. However, Bramwell, J. awarded death sentence to the accused. In justification of the sentence awarded by him, he wrote: "If an influence is so powerful as to be termed irresistible, so much more reason is there why we should not withdraw any one of the safeguards tending to counteract it." English law has changed and more emphasis is now put on the circumstances which might be responsible for the crime. In a Memorandum appended to the Report of the Royal Commission, 1863, Cockburn, C. J. wrote: "It is on the assumption that punishment will have the effect of deterring the crime that its infliction can alone be justified; its proper and legitimate purpose being not to avenge crime but to prevent it. Wisdom and humanity no doubt alike

suggest that if, consistently with this primary purpose, the reformation of the criminal can be brought about, no means should be omitted by which so desirable an end can be achieved. But this, the subsidiary purpose of penal discipline, should be kept in due subordination to its primary and principal one."

✍ In his *Philosophy of Right*, Prof. D. Lioy writes: "Crimes are to be treated as infirmities and the culpable ones diseased subjects whose fury might be subdued in solitude, if they had been impelled to the evil deed by the violence of their passion; and it should aim at correcting their vicious habits by the aid of labour, if they had come to them through idleness and to enlighten their minds by means of instruction, if ignorance had led them astray. By this means law from being vindictive had become just and from being just had become charitable and it completed the act of punishing by the art of healing."

(d) *Retributive Theory*: ✍ In primitive society, punishment was mainly retributive. The person wronged was allowed to have his revenge against the wrongdoer. The principle of "an eye for an eye", "a tooth for a tooth" was recognised and followed. Justice Holmes writes: "It is commonly known that the early forms of legal procedure were grounded in vengeance."

The retributive aspect was recognised in ancient penology. Early criminal law was based on the principle that all evil should be requited. It was believed that the community could be regarded as purged of the evil only in that way. Among the ancient Jews, even animals which killed human beings were regarded as contaminated and were got rid of for the good of the community. Plato was a supporter of the retributive theory. He wrote: "If justice is the good and the health of the soul as injustice is its disease and shame, chastisement is their remedy. If a man is happy when he lives in order, than when he is out of it, it is of importance to him to enter it again and he enters it through chastisement. Every culpa demands an expiation; the culpa is ugly, it is contrary to justice and order; the expiation is beautiful because all that is just is beautiful and to suffer for justice is also beautiful."

Kant, the German philosopher, expressed himself in these words: "Judicial punishment can never serve merely as a means



to further another good, whether for the offender himself or for society, but must always be inflicted on him for the sole reason that he has committed a crime. The law of punishment is a categorical imperative." Kant gave the following example: "Even if a community of citizens dissolves with the consent of every member (e. g., the inhabitants of an island decide to separate and spread all over the world), they must first execute the last murderer in the prison so that everyone gets what is his due according to his deeds."

The view of Sir James Stephen is that the purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. To quote him: "The criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite." Punishment gratifies the feeling of pleasure experienced by individuals at the thought that the criminal has been brought to justice. That desire ought to be satisfied by inflicting punishment in order to avoid the danger of private vengeance.

The view of Sir John Salmond is that the retributive purpose of punishment consists in avenging the wrong done by the criminal to society. A crime is not aimed merely at the sufferer. It is an affront to community itself which should avenge the wrong and see that retribution overtakes the wrongdoer. The purpose of punishment is to gratify the desire for vengeance by making the criminal pay with his body. The retributive purpose of punishment is the elevation of the moral feelings of the community. The emotion of retributive indignation created by injustice is characteristic of all healthy communities. A noble emotion like righteous indignation deserves to be fostered by the State. Through the criminal justice of the State, satisfaction is found for the moral sense of the community. Lilley writes: "The wrong whereby he has transgressed the law of right, has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated. This is the first object of punishment — to make satisfaction to outraged law."

Another view is that retributive punishment is an end in itself. Apart from gain to society and the victim, the criminal should meet his reward in equivalent suffering. Expiation means the

suffering or punishment for an offence    "*The murderer has expiated his crime on the gibbet.*"

Punishment is a form of expiation. To suffer punishment is to pay a debt due to the law that has been violated. Guilt plus punishment is equal to innocence. The penalty of wrongdoing is a debt which the offender owes to his victim. When punishment has been endured, the debt is paid and the legal bond forged by crime is dissolved. The object of true punishment must be to substitute justice for injustice. To compel the wrongdoer to restore to the injured person that which is his own by such restoration and repentance, the spirit of vengeance of the victim is to be satisfied.

Critics point out that punishment in itself is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment in itself is an evil and can be justified only on the ground that it is going to yield better results. Revenge is wild justice. Justice Holmes writes: "This passion of vengeance is not one which we encourage, either as private individuals or as law-makers. Moreover, it does not cover the whole ground. There are crimes which do not excite it and we should naturally expect that the more important purpose of punishment would be coextensive with the whole field of its application." Retribution is only a subsidiary purpose served by punishment.

(e) Theory of Compensation.:—According to this theory, the object of punishment must be not merely to prevent further crimes but also to compensate the victim of the crime. The contention is that the mainspring of criminality is greed and if the offender is made to return the ill-gotten benefits of the crime, the spring of criminality would dry up.

Critics of this theory point out that it tends to oversimplify the motives of the crime. The motive of a crime is not always economic. Offences against the State, against justice, against religion, against marriage and even against persons, may not always be actuated by economic motives. There may be other motives involved in the case. In those cases, the theory of compensation may be neither workable nor effective. Even in the case of offences actuated by such motives, the economic position of the poor offender may be such that compensation may not be available.

If the offender is a rich person, the payment of any amount may be no punishment for him.

In certain cases, the Supreme Court has awarded compensation to persons who have suffered at the hands of government servants. In *Bhim Singh v. State of Jammu and Kashmir*, Bhim Singh was a member of the Legislative Assembly. He was arrested while on his way to attend a meeting of the Assembly. The result was that he was deprived of his constitutional right to attend the Assembly session. The Supreme Court awarded a sum of Rs. 50,000 as compensation and ordered the same to be paid within two months (1986 Cri LJ 192).

A perfect system of criminal justice cannot be based on any one theory of punishment. Every theory has its own merits and every effort must be made to take the good points of all. The deterrent aspect of punishment must not be ignored. Likewise, the reformatory aspect must be given its due place. The personality of the offender is as important as his actions and we must not divorce his action from his personality. The offender is not merely a criminal to be punished. He is also a patient to be treated. Punishment must be in proportion to the gravity of the crime. It must be small for minor crimes and heavy for major crimes. The first offender should be leniently treated. Special treatment should be given to the juvenile offenders. It must not be forgotten that motive for the crime is generally lacking in the case of children. They commit petty offences on account of bad company and bad neighbours. Their cases must be handled with imagination and sympathy. Children must be tried in special courts set up for them. Those in charge of them must try to find out ways and means of reforming them and not punishing them. A criminal should be able to secure his release by showing improvement in his conduct in jail. He who behaves better should be given good diet, clothes and leisure and a part of his sentence should also be remitted. The object of this concession is to convince the offender that normal and free life is better than life in jail. The government should set up mental hospitals and reformatories in place of jails and living conditions in jails should be improved.

### **Kinds of Punishment**

(a) *Capital Punishment* :—In the history of punishment, capital

punishment has always occupied a very important place. In ancient times and even in the Middle Ages, sentencing of offenders to death was a very common kind of punishment. Even for what might be considered as minor offences in modern times, death penalty was imposed. In the reign of George III, there were as many as 220 capital offences. Death penalty was awardable even for offences like shoplifting, cattle-stealing and cutting down of trees. When Samuel Romilly brought proposals for abolition of death penalty for such offences, there was a lot of hue and cry from lawyers, judges, parliamentarians and the so-called protectors of social order. They opposed the proposal on the ground that death penalty acted as a deterrent against the commission of such offences and if that deterrent was removed, the consequences would be disastrous. The opinion of the Chief Justice was that shops would be attacked and bankruptcy and ruin would become the lot of honest and laborious tradesmen. 'The prevention of crime should be the chief object of law and terror alone could prevent the commission of those crimes.

On a similar bill, the Lord Chancellor remarked: "So long as human nature remained what it was, the apprehension of death would have the most powerful cooperation in deterring from the commission of crimes; and he thought it unwise to withdraw the salutary influence of that terror."

The bill for abolition of death penalty for cutting down a tree was opposed by the Lord Chancellor in these words: "It did undoubtedly seem a hardship that so heavy a punishment as that of death should be affixed to the cutting down of a single tree, or the killing or the wounding of a cow. But if the bill is passed in its present state, a person might root up or cut down whole acres of plantations or destroy the whole of the stock of cattle of a farmer without being subject to capital punishment."

In 1810, a bill was brought forward to abolish death penalty for the offence of stealing in a shop to the value of 5 shillings. Lord Ellenborough opposed the bill in these words: "Your Lordships will pause before you assent to a measure so pregnant with danger for the security of property. The learned judges are unanimously agreed that the expediency of justice and public security required that there should not be a remission of capital punishment in this

part of criminal law. My Lords, if we suffer this bill to pass, we shall not know where we stand, we shall not know whether we are on our heads or on our feet." Six times the House of Commons passed the bill and six times the House of Lords rejected the same. The majority on one occasion included all the judicial members, one Archbishop and six Bishops. However, in spite of opposition, the bill was passed and the number of cases in which capital punishment was awarded was reduced year after year and death penalty was reserved for offences like murder and treason.

In his *Essay on Capital Punishment*, Sir James Fitzjames Stephen, the draftsman of the Indian Penal Code, maintained that "no other punishment deters man so effectually from committing crimes as the punishment of death. . . . The threat of instant death is the one to which resort has always been made when there was an absolute necessity of producing some results."

In his statement before the Royal Commission on Capital Punishment, Lord Denning stated: "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformatory or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely, the death penalty. The truth is that some crimes are so outrageous that it (death penalty) is imposed irrespective of whether it is a deterrent or not."

The Royal Commission on Capital Punishment seemed to agree with Lord Denning's view about the justification of death penalty and observed: "The law cannot ignore the public demand for retribution which heinous crimes undoubtedly provoke; it would be generally agreed that, though reform of the criminal law ought sometimes to give a lead to public opinion, it is dangerous to move too far in advance of it."

In spite of these views, death penalty was abolished in the United Kingdom in 1965 except for offences of treason and certain forms of piracy and offences committed by members of the Armed

Forces during wartime. An attempt was made in the United Kingdom in December 1975 to reintroduce death penalty for terrorist offences involving murder but it was defeated in the House of Commons. A similar motion was moved by a Conservative member of Parliament that "the sentence of capital punishment should again be available to the courts" but the motion was rejected by the House of Commons on 19 July, 1979.

The framers of the Indian Penal Code provided for capital punishment but the same was to be resorted to sparingly. The position of capital punishment did not change for more than 100 years but the trend in the direction of the abolition of capital punishment in many countries affected legislative as well as judicial thinking in India. The legislative thinking is reflected in some subtle changes in the Code of Criminal Procedure during the last two decades or so. Before the amendment of the Code of Criminal Procedure in 1955, it was obligatory for a court to give reasons for not awarding death sentence in a case of murder. The amendment of 1955 did away with the requirement of assigning reasons for not giving death sentence in an appropriate case. Under the new Code of Criminal Procedure, 1973, the court has to record reasons for awarding death sentence. It is clear that the provisions regarding death sentence have gradually been liberalised in favour of guilty persons.

The recent trend in India is clearly towards the abolition of death sentence. In *Ediga Anamma v. State of Andhra Pradesh*, the Supreme Court of India observed: "While murder in its aggravated form in the extenuating factors connected with crime, criminal or legal process, still is condignly visited with death penalty, a compassionate alternative of life imprisonment in all other circumstances is gaining judicial ground." [(1974) 4 SCC 443].

In *Raghubir Singh v. State of Haryana*, although the Supreme Court accepted the contention that the murder was treacherous, death sentence was reduced to life imprisonment. [(1975) 3 SCC 37].

In *Rajendra Prasad v. State of Uttar Pradesh*, the appellant was sentenced to life imprisonment in a previous case but released on Gandhi Jayanti day. He again committed murder and was sentenced to death by the Sessions Judge and his death sentence was

confirmed by the High Court. However, the same was converted into life imprisonment by the Supreme Court. [(1979) 3 SCC 646]. Earlier, in *Raghubir Singh v. State of Haryana*, the Supreme Court commuted the death sentence to life imprisonment.

In *Bachan Singh v. State of Punjab*, the Supreme Court held by a majority of four to one that the provision of death sentence as an alternative punishment for murder in Section 302 of the Indian Penal Code is not unreasonable and is in the public interest. Section 302 violates neither the letter nor the ethos of Article 19 of the Constitution. The provision of death sentence as an alternative punishment for murder does not violate Article 21 of the Constitution. By no stretch of imagination it can be said that death penalty constitutes an unreasonable, cruel or unusual punishment. The framers of the Constitution did not consider death sentence for murder as a degrading punishment which would defile "the dignity of the individual". Death sentence for the offence of murder also does not violate the basic structure of the Constitution. To commit a crime is not an activity guaranteed by Article 19(1) of the Constitution. A very large segment of people the world over, including sociologists, legislators, jurists, judges and administrators still fairly believe in the necessity of capital punishment for protection of society. The penalty has still a recognised legal sanction in most of the civilised countries in the world and the framers of the Indian Constitution were fully aware of the existence of death penalty as punishment for murder under Section 302 of the Indian Penal Code. It is not possible to hold that the provision of death penalty as an alternative punishment for murder is not in the public interest. [(1980) 2 SCC 684].

The dissenting view of Justice Bhagwati was that instead of death sentence, the sentence of life imprisonment should be imposed. He pointed out that the international trend was towards the abolition of death penalty and a large number of countries has abolished death penalty *de jure* or *de facto*. As on 30th May, 1979, the following countries had abolished death penalty for all offences: Australia, Brazil, Colombia, Denmark, Federal Republic of Germany, Finland, Norway, Sweden, Portugal etc. Canada, Italy, Spain, Switzerland, the Netherlands, Peru and Malta had abolished death penalty in time of peace but retained it for specific offences committed in time of war. Many other States had retain-

ed death penalty on their statute books but they did not conduct any execution for many years. Many States in the United States of America had abolished death penalty. The United Kingdom abolished death penalty in 1965. The United Nations had gradually shifted from the position of neutral observer concerned about but not committed on the question of death penalty to a position favouring the eventual abolition of death penalty. The objective of the United Nations is that capital punishment should ultimately be abolished in all countries.

Justice Bhagwati referred to the Indian Penal Code (Amendment) Bill, 1972 which sought to narrow drastically the judicial discretion to impose death penalty and tried to formulate the guidelines which should control the exercise of judicial discretion. The Bill was passed by the Rajya Sabha in 1978 but it lapsed on account of the dissolution of the Lok Sabha. That indicated the direction in which the change was taking place.

Justice Bhagwati also referred to the views of Jayaprakash Narayan, Andrei Sakharov, Victor Hugo and Mahatma Gandhi in support of his contention. The view of Jayaprakash Narayan was that a humane treatment even of a murderer will enhance the dignity of man and make society more human. Sakharov regards "death penalty as a savage and immoral institution which undermines the moral and legal foundation of society. . . . I reject the motion that death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true—that savagery begets only savagery. . . . I believe that death penalty has no moral or practical justification and represents a survival of barbaric customs of revenge, bloodthirsty and calculated revenge with no temporary insanity on the part of the judges and therefore shameful and disgusting". Tolstoy, Victor Hugo and Mahatma Gandhi have expressed themselves against capital punishment.

Justice Bhagwati has put emphasis on barbarity and cruelty involved in death sentence. Death penalty is irrevocable. It cannot be recalled. It extinguishes the flame of life for ever. It is destructive of the right to life which is the most precious right of all, a right without which enjoyment of no other right is possible. It silences for ever a living being and despatches him to a country from which there is no return. By reason of its cold and



cruel finality, death penalty is qualitatively different from all other forms of punishment. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. However, that is not possible where a person has been wrongly convicted and sentenced to death and put out of existence in pursuance of the sentence of death. In his case, even if any mistake is subsequently discovered, it will be too late because he cannot be brought back to life. The execution of death sentence makes miscarriage of justice irrevocable. Through its judicial instrumentality, the State would have killed an innocent man. However careful may be the procedural safeguards erected by law before penalty can be imposed, it is impossible to eliminate the chance of judicial error. No possible judicial safeguard can prevent the conviction of the innocent.

Justice Bhagwati further points out that death penalty is barbaric and inhuman in its effect, mental and physical, upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous. Intense mental suffering is inevitably associated with confinement under sentence of death. Anticipation of approaching death can and does produce stark terror. There is also the excruciating mental anguish and severe psychological strain which the condemned prisoner has to undergo on account of the long wait from the date when the sentence of death is initially passed by the Sessions Court until it is confirmed by the High Court and then the appeal against death sentence is disposed of by the Supreme Court and if the appeal is dismissed, then until the clemency petition is considered by the President and if it is turned down, then until the time appointed for the actual execution of the sentence of death arrives. The worst time for most of the condemned prisoners is the last few hours when all certainty is gone and the moment of death is known.

Death penalty cannot be said to be appropriate to the offence merely because it may be or is believed to be an effective deterrent against the commission of the offence. Death penalty cannot be regarded as appropriate to the offence of murder merely because the murder is brutal, heinous or shocking. The nature and magnitude of the offence or the motive and purposes underlying it or the manner and extent of its commission cannot have any relevance to the proportionality of death penalty to the offence.

The view of Justica Bhagwati is that death penalty for the offence of murder does not serve any legitimate social purpose, whether it is reformation, denunciation by the community or retribution and deterrence. The civilised goal of criminal justice is the reformation of the criminal and death penalty means the abandonment of this goal for those who suffer it. Death penalty cannot serve the reformatory goal because it extinguishes life and puts an end to any possibility of reformation. It defeats the reformatory end of punishment. There is no way of accurately predicting or knowing with any degree of moral certainty that a murderer will not be reformed or is incapable of reformation. There are examples of cases where the most vicious have been reformed.

Justice Bhagwati does not accept the argument advanced in support of death penalty that every punishment is to some extent intended to express the revulsion felt by the society against the wrongdoer and therefore punishment must be commensurate with the crime and as murder is one of the gravest crimes against society, death penalty is the only punishment which fits such crimes and hence it must be held to be reasonable. According to Justice Bhagwati, the denunciatory theory is a remnant of a primitive society which had no respect for the dignity of man and worth of the human person and seeks to assuage its injured conscience by taking revenge on the wrongdoer. Revenge is an elementary passion of a brute and betrays lack of culture and refinement. The manner in which a society treats crime and criminals gives the surest index of its cultural growth and development. A society which is truly cultured can never harbour a feeling of revenge against a wrongdoer. The wrongdoer is as much a part of the society as anyone else and by exterminating him, society will injure itself.

Retaliation can have no place in a civilised society and particularly in the land of Buddha and Gandhi.

To take human life even with the sanction of law and under the cover of judicial authority, is retributive barbarity and violent futility, travesty of dignity and violation of the divinity of man. So long as the offender can be reformed through the rehabilitatory therapy and can be reclaimed as a useful citizen and made con-

scious of the divinity within him, there can be no moral justification for liquidating him out of existence.

The only ground on which death penalty may be sought to be justified is reprobation which is nothing but a different name for revenge and retaliation. It is difficult to appreciate how retaliatory motivation can ever be countenanced as a justificatory reason. The reason is wholly inadequate as it does not justify punishment by its results. It merely satisfies the passion for revenge masquerading as righteousness.

Justice Bhagwati rejects the view that death penalty acts as a deterrent against potential murderers. According to him, this view is a myth which has been carefully nurtured by a society which is actuated not so much by logic or reason as by a sense of retribution. Justice Frankfurter of the Supreme Court of the United States expressed the same view in the course of his examination before the Royal Commission on Capital Punishment: "I think scientifically the claim of deterrence is not worth much." A similar view was expressed by the Royal Commission on Capital Punishment: "Whether the death penalty is used or not and whether executions are frequent or not, both death penalty States and abolition States have rates which suggest that these rates are conditioned by other factors than the death penalty." Again, "the general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increasing homicide rate or that its reintroduction has led to a fall".

The view of Prof. Sellin is that "there is no evidence that the abolition of capital punishment generally causes an increase in criminal homicides, or that its reintroduction is followed by a decline. The explanation of changes in homicide rates must be sought elsewhere".

Justice Bhagwati points out that the knowledge that death penalty is rarely imposed and almost certainly it will not be imposed takes away whatever deterrent value death penalty might otherwise have. The expectation, bordering almost on certainty, that death sentence is extremely unlikely to be imposed is a factor which would condition the behaviour of the offender and death

penalty cannot in such a situation have any deterrent effect. The risk of death penalty being remote and improbable, it cannot operate as a greater deterrent than the threat of life imprisonment.

In order to remove the vice of arbitrariness in the imposition of death penalty, Justice Bhagwati recommends that there should be an automatic review of the death sentence by the Supreme Court sitting as a whole and death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting together. Death sentence should be imposed only if the Supreme Court comes to the conclusion that the offender is a serious menace to society and it is in the interests of society that he should be eliminated. [(1982) 3 SCC 24].

There is going on a debate between those who stand for the abolition of capital punishment and those who want to retain it. Those who stand for its abolition maintain that capital punishment has not served its deterrent object at all. In certain States of the United States where death penalty has been abolished, there are fewer serious crimes than in those States where capital punishment is retained. If capital punishment had the deterrent effect, crimes in the former States ought to have increased and those in the latter States ought to have decreased. The conclusion is that statistics do not prove the deterrent effect of capital punishment.

It is also contended that crimes are committed very often not by normal human beings under normal circumstances. It is not even certain that a murderer would repeat murder again. He might have committed the heinous crime of murder under extraordinary circumstances. If law were to kill that man, it can have the superficial satisfaction of having prevented a crime which probably would not have been committed. In its anxiety to prevent a crime, the State itself commits the greatest crime of taking away the life of man.

Prof. Hentig points out that no right-thinking person can claim that our law of evidence and the law of procedure are fool-proof and always lead inevitably to truth. It is possible that there are judicial errors and in such cases if capital punishment is once carried out, the same cannot be revoked. Thus, capital punishment is neither effective nor just. It is better to save nine murderers

from capital punishment than to execute one who may in fact be innocent

Those who want to retain the sentence of capital punishment argue that there are some offenders who are not only incorrigible but also immensely dangerous to society. There is no reason why society should be burdened with maintaining such people. If an offender cannot be cured and the incorrigible element is harmful to human society, the best thing is to carry out the death sentence.

Another argument in favour of capital punishment is that punishment by the State is a substitute for private revenge. If a murderer is not punished with death, it is quite possible that other relatives of the victim might murder the murderer and thus a chain of murders may start. So long as human emotions are powerful and the powers of vengeance prevail, capital punishment is a necessary kind of punishment.

The view of Lord Denning is that capital punishment is the way in which society expresses its denunciation of the wrongdoer. It is necessary to maintain respect for law. Some crimes are so outrageous that society insists on adequate punishment for the wrongdoer.

Justice Stewart observes: "I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organised society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then there are sown the seeds of anarchy — of self-help, vigilance, justice, and lynch law."

A similar view was expressed by the British Royal Commission in its Report: "We think it is reasonable to suppose that the deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder. The fact that men are hung for murder is one great reason why murder is considered so dreadful a crime. This widely diffused effect on the moral consciousness of society is impossible to assess,

but it must be at least as important as any direct part which the death penalty may play as a deterrent in the calculations of potential murders...."

Former Prime Minister Lloyd George expressed his view on capital punishment in these words: "The first function of capital punishment is to give emphatic expression to society's peculiar abhorrence of murder.... It is important that murder should be regarded with peculiar horror.... I believe that capital punishment does, in the present state of society, both express and sustain the sense of moral revulsion for murder."

According to Dr. Ernest Van Den Haag, a very strong symbolic value attaches to execution. The motives for death penalty may include vengeance, but legal vengeance solidifies social solidarity against law-breakers and probably is the only alternative to the disruptive private revenge of those who feel harmed.

The view of a judge of the Ontario Appeal Court is that with the advent of armed criminals and substantial increase in armed robberies, criminals of long standing, if arrested, must expect long sentences. If they run no risk of hanging when found guilty of murder, they will kill policemen and witnesses with the prospect of a future no more unhappy than being fed, lodged and clothed for the rest of their lives. Moreover, once in prison, such people who are capable of anything, could kill their guards and fellow inmates with relative impunity.

J.J. Maclean of Canada defends the right of the State to award capital punishment for murder. According to him, if the State has the right and duty to defend the community against outside aggression such as in time of war and within the country, for instance, in case of treason etc and that to the extent of taking the life of the aggressors and guilty parties, if the citizen wants to protect his own life by killing whoever attacks without any reason, the State can do the same when a criminal attacks and endangers the life of the community by deciding to eliminate summarily another human being. Capital punishment must be retained to prove the sanctity of that most precious thing which is the gift of life. It embodies the revulsion and horror that we feel for the greatest of crimes. As a deterrent, death penalty is playing its part for which there is no substitute.

Vernon Rich writes: "The isolation theory of crime and punishment is that the criminal law is a device for identifying persons dangerous to society who are then punished by being isolated from society as a whole, so that they cannot commit other anti-social acts. The isolation theory is used to justify the death penalty and long term imprisonment. Obviously, this theory is effective in preventing criminal acts by those executed or permanently incarcerated."

George A. Floris expresses himself in favour of death penalty in these words: "It is feared that the most devastating effects of the abolition will, however, show themselves in the realm of political murder. An adherent of political extremism is usually convinced that the victory of his cause is just round the corner. So, for him long term imprisonment holds no fear. He is confident that the coming ascendancy of his friends will soon liberate him." To prove this proposition, Floris gives the example of Von Papen's government which in September 1932 reprieved the death sentence passed on two of Hitler's stormtroopers for brutal killing of one of their political opponents. The Retentionists believe that the dismantling of gallows will almost everywhere enhance the hit and run attacks on political opponents. Capital punishment is the most formidable safeguard against terrorism.

Even in England, death penalty has been retained for high treason. In the aftermath of assassination of Prime Minister Bandaranaike in 1959, Ceylon reintroduced capital punishment for murder. Likewise, Israel sanctioned death penalty for crimes committed against the Jewish people and executed Eichmann in 1962 on the ground that he was responsible for the deaths of many Jews. In 1979, Israel sanctioned the use of death penalty "for acts of inhuman cruelty".

The Law Commission of India in its 35th Report has given reasons for the view that capital punishment has a deterrent effect. Basically, every human being dreads death. Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality and not merely of degree. The view of the majority of the State Governments, Judges, Members of Parliament and Legislatures and members of the Bar and Police Officers is that the deterrent object of capital punishment is achieved in a fair measure in India.

(b) *Deportation*: Another way of punishment is the deportation of incorrigible or dangerous offenders. This method used to be called transportation in India. However, this is not a solution to the problem. If a person is dangerous in one society and if he is let loose in another society, he is likely to be equally dangerous there also. Even if a separate colony or settlement is created for the deportation of such offenders, the problem of maintaining such a settlement would be a very difficult one. Moreover, such a colony would have a degrading influence on the character of the offenders. Punishment in the form of deportation was abolished long ago in Britain and it has now been abolished in India also.

(c) *Corporal punishment*: Another form of punishment is corporal punishment. This punishment includes modulation, flogging (or whipping) and torture. Previously, this was a very common form of punishment. Right up to the Middle Ages, whipping was one of the commonest forms of punishment. It was also a very severe form of punishment. Many persons died as a result of the wounds received by them on account of flogging or whipping. Whipping in public used to be common during the ancient and Medieval times in India.

The main object of this kind of punishment is deterrence. However, critics point out that this kind of punishment is not only inhuman but also ineffective. The person who undergoes this kind of punishment may become more anti-social than he was before. Criminal tendencies in him may become hardened and it may be an impossible task to reform him. Whipping was one of the forms of punishment originally provided for in the Indian Penal Code but the same was abolished in 1955. Pakistan has recently introduced flogging as a form of punishment.

A few criminologists have suggested that whipping should be reintroduced in India as a kind of punishment. Their contention is that simple imprisonment itself does not have the same deterrent effect as whipping. This is particularly so in the case of a rich offender. There is opposition to the suggestion on the ground that whipping is a barbaric form of punishment and it should not be introduced in the civilised society of today. Whipping produces only the rougher kind of criminal. Dr. Barnes writes: "I never



knew a convict benefited by flagellation. The beaten may become a more desperate character.”

(d) *Imprisonment*: Another form of punishment is imprisonment. If properly administered, imprisonment can serve all the three objects of punishment. It may be deterrent because it makes an example of the offender to others. It may be preventive because it disables the offender, at least for some time, from repeating the offence. If properly used, it might give opportunities for reforming the character of the accused. However, there is the problem of fixing the period of imprisonment. Both short term and long term imprisonments have their inherent disadvantages. Short term imprisonments are regarded not only useless but also dangerous. They are useless because no institutional training or treatment is possible in short terms like one month or six months. They are dangerous because jails provide ideal surroundings to the novices and the minor offender for further training in a criminal career.

The Supreme Court of India has pointed out the dangers of long term imprisonment in a number of cases and has reduced the period of incarceration in appropriate cases e.g., *Ashok Kumar v. State (Delhi Administration)*, (1980) 2 SCC 282 and *Nadella Venkatakrishna Rao v. State of Andhra Pradesh*, (1978) 1 SCC 208.

Sometimes, the accused are sentenced to both imprisonment and fine and sometimes fine only. The view of Lord Goddard is that fine should not be used to give an opportunity to persons of means to avoid the punishment of imprisonment.

In judging the adequacy of sentence, the nature of the offence, circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would ordinarily be taken into consideration by the court.

(e) *Solitary confinement*: Another kind of punishment is solitary confinement which is an aggravated kind of punishment. Solitary confinement exploits fully the sociable nature of man. By denying him the society of his fellow beings, it seeks to inflict pain on him.

Critics point out that this kind of punishment is inhuman and perverse. There is every possibility of a man of sound mental health being turned into a lunatic. If used in excess, it may inflict permanent harm on the offender. However, if used in proportion, this kind of punishment may be useful. If those limits are surpassed, it becomes cruel.

Sections 73 and 74 of the Indian Penal Code lay down the limits beyond which solitary confinement cannot be imposed in India. The total period of solitary confinement cannot exceed three months in any case. It cannot exceed 14 days at a time with intervals of 14 days in between or 7 days at a time with 7 days interval in between.

(f) Indeterminate sentence: Another kind of imprisonment is indeterminate sentence. In this case, the accused is not sentenced to imprisonment for any fixed period. The period is left indeterminate at the time of the award. When the accused shows improvement, the sentence may be terminated.

It is the view of some criminologists that punishment of fine, in addition to serving its deterrent object, also serves three more purposes. It may help to support the dependents of the prisoner. It might provide expenses for the prosecution of the prisoner. It may be used for compensating the aggrieved party. This kind of punishment may be very useful if the criminals are not hardened. Care must be taken that heavy and excessive fines which result in the forfeiture of the property of the offender, should not be inflicted. Facilities for collecting fines must be created in such a way that levying of fine does not inevitably drive the offender to the prison on account of his inability to pay the fine.

## Civil Justice

### *Primary and Sanctioning Rights*

The rights enforced by civil proceedings are of two kinds viz., primary rights and sanctioning rights. Primary rights are those rights which exist as such. They do not have their source in some wrong. Sanctioning or remedial rights are those rights which come into being after the violation of a primary right. A primary right is a right arising out of conduct or as a *jus in rem*.

A sanctioning right is one which arises out of the violation of another right. If *A* enters into a valid contract, his right to have the contract performed is a primary right. If the contract is broken, his right to damages for the loss caused to him for the breach of contract is sanctioning right. A primary right may be enforced by specific enforcement. A sanctioning right is enforced by sanctioning enforcement. Specific enforcement lies in either specific performance or specific restitution (restoring a person to his *status quo*). Where primary rights can be enforced, there is no question of any sanctioning right for that purpose. The cases of the enforcement of a primary right are where a defendant is compelled to perform a contract or to pay a debt. The enforcement of the primary right is called specific enforcement.

Sanctioning rights are (i) the right to be compensated by damages by the wrongdoer, or (ii) the right to exact the imposition of pecuniary penalty on the wrongdoer by penal action. The first is divided into two types: restitution and penal redress. Restitution lies in restoring the plaintiff to his original position. Penal redress involves restitution of all benefits the offender derives from his wrongful act, plus a full redress for the plaintiff's loss.

### *Penal and Remedial Proceedings*

All legal proceedings can be divided into five categories viz, action for specific enforcement, action for restitution, action for penal redress, penal action and criminal prosecution. Actions for penal redress, penal action and criminal prosecution are called penal proceedings because their ultimate purpose is punishment. Actions for specific enforcement and restitution are called remedial proceedings as their object is to remedy a wrong. In the case of penal proceedings, the ultimate purpose of law is on the whole or in part the punishment of the defendant. That is so where a person is imprisoned or held liable in damages to the person injured by him. In the case of remedial proceedings, the idea of punishment is entirely absent. From the point of view of legal theory, the distinction between penal and remedial proceedings is very important. All criminal proceedings are penal although the converse is not true. Some civil proceedings are also penal while others are of a remedial nature.

*Secondary Functions of Courts of Law*

The primary function of a court of law is the administration of justice. It has to enforce rights and punish wrongs. In every case, there are two parties, viz., the plaintiff and the defendant or the prosecutor and the accused. However, in addition to this other functions are also performed by courts of law.

(1) Courts adjudicate on the claims of citizens against the State. It seems logically impossible to conceive of the forces of the State being used against itself. However, the laws of all modern States provide remedies for individual citizens against the State to be pursued in its own courts. In the case of India, a suit can be brought against the Union of India or the Government of a State. In England, no action could be brought against the Crown up to the passing of the Crown Proceedings Act, 1947. However, even then, in the case of contractual liabilities, a British subject could put in a petition of right which was governed by the Petition of Rights Act, 1860. A petition of right could also be made for the recovery of real property, chattel or damages for a breach of contract. If a petition of right was refused, there was no appeal against that. However, the petition was always granted unless the same was frivolous and did not disclose any cause of action at all. A judgment in favour of a petitioner in a petition of right was in the form of a declaration of the rights of the petitioner and was as effective as a judgment in ordinary action in an ordinary court. The Crown Proceedings Act, 1947 provides that where a person has a claim against the Crown, that claim can be enforced.

(2) Another function of the courts is the declaration of the rights of individuals. This is done where the rights of the parties are uncertain. What a court does is that it gives an authoritative declaration of the rights of the person concerned. Examples of declaratory proceedings are the declaration of legitimacy, declaration of nullity of marriage, advice to trustees or executors regarding their legal powers and duties, authoritative interpretation of wills etc.

(3) In certain cases courts of justice undertake the management and distribution of the property of a deceased person and also of minors whose property is put under the Court of Wards

Other examples of administrative functions are the administration of the trust, the realisation and distribution of an insolvent estate, liquidation of a company by the court etc.

In certain cases, judicial decrees are employed as the means of *creating, extinguishing and transferring rights*. Examples of such functions are a decree of divorce or judicial separation, adjudication of bankruptcy, a decree of foreclosure against a mortgagor, appointment or removal of trustees, grant of letters of administration etc. In such cases, the judgments of the courts operate not as the remedy of a wrong but as a title of right.

Superior courts are often armed with the power of supervising the courts below them. Such a power is given to the High Courts in India by Article 227 of the Constitution of India.

### SUGGESTED READINGS

- Abel-Smith, B. and  
Stevens, R. : *In Search of Justice*, 1968.
- Allen, S.K. : *Aspects of Justice*.
- Ancel, Marc : *Capital Punishment*.
- Beccaria : *Crimes and Punishment*.
- Brett, Peter : *An Inquiry into Criminal Guilt*, Melbourne, 1963.
- Cahn, E.N. : *The Sense of Injustice*, 1949.
- Chambliss, W.J. : *Crime and the Legal Process*.
- Chhabra, Kirpal  
Singh : *Quantum of Punishment in Criminal Law*.
- Cook, Fred J. : *Capital Punishment: Does it Prevent Crime?*
- Del Vecchio, G. : *Justice*, 1952.
- Devlin, Patrick : *The Judge*.
- Dostoyevsky : *Crime and Punishment*.
- Dowrick : *Justice According to English Common Lawyers*.
- Ewing : *The Morality of Punishment*.
- Ginsberg, M. : *On Justice in Society*, 1965.
- Hayner & Crannor : *The Death Penalty in Washington State*.
- Hentig, Hans Von : *Punishment, Its Origin and Purpose*.
- Jorgensen, S. : *Law and Society*, 1972.
- Keeton, R.E. : *Venturing to do Justice*, Oxford University Press, 1969.
- Kenny : *Outlines of Criminal Law*.
- Lloyd, D. : *The Idea of Law*.

- Margaret : *The Crime and Punishment.*
- Morris, Norval : *Capital Punishment : Developments 1961-65.*
- Mullins, C. : *In Quest of Justice*, John Murray, 1931.
- Pannick, David : *Judicial Review of the Death Penalty.*
- Pieper, Joseph : *Justice.*
- Pollock : *A First Book of Jurisprudence*, 1929.
- Potter, H. : *The Quest of Justice*, Sweet and Maxwell, 1951.
- Quinney, R. (Ed.) : *Crime and Justice in Society*, 1969.
- Radzinowicz, L. and  
Wolfgang, M.E. : *Crime and Justice*, 1971
- Rawls, J. : *A Theory of Justice*, Clarendon Press, 1972.
- Reckless, Walter C. : *The Use of the Death Penalty—Factual Statement.*
- Report of Amnesty International, 1979.
- Report of Royal Commission on Capital Punishment, 1949-53.
- Rich, Vernon : *Law and the Administration of Justice.*
- Ross, A. : *On Law and Justice*, Stevens and Sons Ltd., 1958.
- Russell : *On Crime.*
- Sakharov, Andrei : *Message to Stockholm Conference on Abolition of Death Penalty* (Organised by Amnesty International in 1978).
- Samuelson, Glenn  
W. : *Why was Capital Punishment Restored in Delaware?*
- Savitz, Leonard O. : *A Study in Capital Punishment.*
- Schuessler, Karl F. : *The Deterrent Influence of the Death Penalty.*
- Sellin, Thorsten : *Capital Punishment*, 1967.
- Stephens, Sir James  
Fitz James : *Essay on Capital Punishment.*
- Stephen, Sir James  
Fitz James : *General View of the Criminal Law of England.*
- Stone, J. : *Social Dimensions of Law and Justice*, 1966.
- Sutherland, E.H. : *Murder and the Death Penalty.*
- Taylor, I. and  
Taylor, L. : *The Politics of Deviance*, 1973.
- Taylor, I., Walton,  
P., Young, J. : *The New Criminology*, 1973.
- Thirty-fifth Report of the Law Commission of India on Death Penalty.

- Tidmarsh Halloran  
and Connolly . *Capital Punishment : A Case for Abolition.*
- Vold, George B : *Can Death Penalty Prevent Crime?*
- Washington Re-  
search Project : *The Case Against Capital Punishment*
- Williams, G J . *Criminal Law.*
- Zeisel, Hans *The Deterrent Effect of the Death Penalty Facts v. Faith*
- Zimring, F E and  
Hawkins, G J . *Deterrence, 1973.*

## VIII

### SOURCES OF LAW

#### **Meaning of Sources of Law**

The term "sources of law" has been used in different senses by different writers and different views have been expressed from time to time. Sometimes, the term is used in the sense of the sovereign or the State from which law derives its force or validity. Sometimes it is used to denote the causes of law or the matter of which law is composed. It is also used to point out the origin or the beginning which gave rise to the stream of law. C.K. Allen uses it in the sense of agencies through which the rules of conduct acquire the character of law by becoming definite, uniform and compulsory. Vinogradoff uses it as the process by which the rule of law may be evolved. Oppenheim uses it as the name for a historical fact out of which the rules of conduct come into existence and acquire legal force. According to Prof. Fuller, the problem of "sources" in the literature of jurisprudence relates to the question: "Where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will commonly be listed statutes, judicial precedents, custom, the opinion of experts, morality and equity." (*Anatomy of the Law*, p. 69).

**Holland:** According to Holland, the expression "sources of law" is sometimes employed to denote the quarter whence we obtain our knowledge of the law, e.g., whether from the statute book, the reports or esteemed treatises. Sometimes it is used to denote the ultimate authority which gives them the force of law, i.e., the State. Sometimes it is used to indicate the causes which, as it were, automatically brought into existence rules which have subsequently acquired that force viz., custom, religion and scientific discussion. Sometimes it is used to indicate the organs through which the State either grants legal recognition to rules previously unauthoritative or itself creates new law, viz., adjudication, equity and legislation.



Rupert Cross writes that the phrase "source of law" is used in several different senses. First, there is the literary source, the original documentary source of our information concerning the existence of a rule of law. In this sense, the law reports are a source of law, whereas a textbook on tort or contract, or a digest of cases falls into the category of legal literature. Next, there are the historical sources of law, the sources — original, mediate or immediate — from which rules of law derive their content as a matter of legal history. In this sense, the writings of Bracton and Coke and the works of other great exponents of English law are sources of law, for they enunciate rules which are now embodied in judicial decisions and Acts of Parliament. In this sense too, Roman law and medieval customs are sources of English law, for parts of our law which are now immediately attributable to decisions in particular cases or specific statutory provisions can be traced to a rule of Roman law, and a great deal of the English land law originated in feudal custom. This sense of the phrase "source of law" can be extended to anything which accounts for the existence of a legal rule from the causal point of view. On the one hand, it may be applied to the Queen-in-Parliament and Her Majesty's judges as the immediate authors of rules of law; on the other hand, it may be used to cover public opinion, moral principles and even those judicial idiosyncrasies which some American realists insist should be the true subject matter of a mature study of law. (*Precedent in English Law*, p. 146).

*Natural Law*: According to the school of natural law, law has a divine origin. Every law is the gift of God and the decision of sages. The Quran is the word of God. The Hadis contain the precepts of the Prophet as inspired and suggested by God. According to the Hindus, the Vedas were inspired by God. The law of Lycurgus in Greece had a divine origin. Moses got the Commandments from Jehovah and Hammuradi got his code from the Sun God.

*Austin*: John Austin refers to three different meanings of the term "sources of law". In the first place, the term refers to the immediate or direct author of the law which means the sovereign in the country. Secondly, the term refers to the historical

document from which the body of law can be known, e.g., the Digest and Code of Justinian. In the third place, the term refers to the causes which have brought into existence the rules which later on acquire the force of law. Examples are customs, judicial decisions, equity, legislation etc.

The analytical school of jurisprudence represented by Austin is attacked by the exponents of the historical school as represented by persons like Savigny, Sir Henry Maine, Puchta etc. Their contention is that law is not made but is formed. The foundation of law lies in the common consciousness of the people which manifests itself in the practices, usages and customs of the people. Customs and usages are the sources of law.

*Sociological view:* The sociological school of law protests against the orthodox conception of law according to which law emanates from a single authority in the State. According to this school, law is taken from many sources and not from one. Ehrlich writes: "At the present as well as any other time, the centre of gravity of legal development lies not in legislation, not in juristic science nor judicial decisions, but in society itself." Duguit writes that law is not derived from any single source and the basis of law is public service. There need not be any specific authority in a society which has the power of making laws.

*Salmond:* The view of Salmond was that the two main sources of law were formal and material. Material sources could be subdivided into legal sources and historical sources. Legal sources were legislation, precedent, custom, agreement and professional opinion.

A formal source of law was defined by Salmond as that from which a rule of law derives its force and validity. The formal source of law was the will of the State as manifested in statutes or decisions of the courts. The authority of law proceeds from that. However, this approach depends upon the particular definition of law adopted by Salmond.

### **Material Sources : Legal and Historical**

The material sources of law are those from which is derived the *matter*, though not the *validity* of the law. The matter of law may be drawn from all kinds of material sources.

According to Salmond, material sources of law are of two kinds, legal and historical. *Legal sources* are those sources which are the instruments or organs of the State by which legal rules are created, e.g., legislation and custom. They are authoritative and are followed by law courts as of right. They are the gates through which new principles find admittance into the realm of law. *Historical sources* are sources where rules, subsequently turned into legal principles, were first to be found in an unauthoritative form. They are not allowed by the law courts as of right. They operate only *mediately* and *indirectly*. Both the Acts of Parliament and the works of Bentham are material sources of English law, but Acts of Parliament become law forthwith and automatically but what Bentham says may or may not become law. That depends upon its acceptance by the legislature or the judiciary. Likewise, the decisions of the Supreme Court of India are binding precedents for all courts in India, but the decisions of the Supreme Court of the United States are not binding in India. They may or may not be recognised and followed in Indian courts. In India, much of the early law is based on the precepts of religion. The Codes of Manu and Brihaspati were almost entirely based on religious precepts. During the reign of Aurangzeb, most of the law had its origin in the Holy Koran.

In respect of its material origin, a rule of law has often a long history. Its immediate source may be a decision by a court of law, but that court may have based its decision on the writing of some lawyer, e.g., Pothier. Pothier himself may have taken the material from the edict of an urban praetor. In such a case, the decision, the works of Pothier, the Code of Justinian and the edict of the urban praetor are the material sources of the rule of law. However, there is a difference between them as a precedent is a legal source of law and others are merely historical sources. Precedent has its source not merely in fact but also in law. The others are its sources in fact and not in law.

Critics find fault with Salmond's classification of sources of law into formal and material sources of law. Allen criticises Salmond for his attaching little importance to historical sources. Keeton also criticises Salmond's classification of formal sources. According to him, in modern times, the only formal

source of law is the State, but the State is an organisation which enforces law. Therefore, it cannot be considered as a source of law in the technical sense.

While criticising Salmond, Keeton writes that the meaning of the term "source of law" is the material out of which law is eventually fashioned through the activity of judges. He gives his own classification of the sources of law: the binding sources of law and persuasive sources of law. The binding sources of law are those which are binding on the judge and he is not independent in their application. Those sources of law are legislation, judicial precedents and customary law. The persuasive sources of law are useful only when there are no binding sources of law on a particular point. Some of such sources are professional opinions and principles of morality or equity.

Salmond's classification of sources of law into formal and material sources simply indicates the binding or persuasive nature of the source and therefore its criticism by Allen is not well-founded. However, taken as a whole, the classification of Salmond into formal and material sources of law is not satisfactory and perhaps that is the reason why the editor of the twelfth edition of *Salmond on Jurisprudence* has omitted the classification into formal and material. The only classification now given in Salmond's book is legal and historical sources. The editor starts by saying that sources of law can be classified as either legal or historical. The former are those sources which are recognised as such by the law itself. The latter are those sources which lack formal recognition by the law. The legal sources of law are authoritative, the historical are unauthoritative. The former are allowed by law courts as of right, the latter have no such right. They influence more or less extensively the course of legal development but they speak with no authority. Legal sources are the only gates through which new principles can find entrance into the law. Historical sources operate only mediately and indirectly. Every legal system contains rules of recognition determining the establishment of new law and the disappearance of old. It is a principle of English law that any principle involved in a judicial decision has the force of law. Similar legal recognition is extended to the law-producing effect of statute and immemorial

customs. These rules establish the sources of the law. A source of law is any fact which in accordance with such basic rules determines the recognition and acceptance of any new rule as having the force of law.

Salmond points out that the line between legal and historical sources in English law is not crystal clear. There are sources lying well to each side of the line. A statute is clearly a legal source which must be recognised and the writings of Bentham are without legal authority. No English court is bound to follow the decisions of the Privy Council which are at best of high persuasive value only. No decision of the High Court of Justice is binding on other High Court judges, on the Court of Appeal or on the House of Lords. The view of Salmond is that according to the basic rules of English law, certain statements of law are absolutely binding in some but not all contexts, others are not binding in any context but are of persuasive value and others yet lack even persuasive force. The distinction between legal and historical sources is useful as a starting point and must not be pressed too far.

All rules of law have historical sources. They have their origin somewhere although it may not be known to us. However, all of them do not have legal sources. The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a Municipal Council and the rule that these by-laws have the force of law has its source in an Act of Parliament. The question arises from where comes the rule that Acts of Parliament have the force of law. The answer is that the source is historical only and not legal. The historians of constitutional law know its origin but lawyers must accept it as self-existent. It is the law because it is the law and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament. Likewise, the rule that judicial decisions have the force of law is legally ultimate and underived. No statute lays it down. The doctrine of parliamentary sovereignty in England involves more than merely the usage and practice. It involves the acceptance of the view that Parliament's word ought to be observed. It is not a mere hypothesis to be assumed for the sake of argument. Parliament is in fact supreme. These ultimate principles are the rules of law.

## Legal Sources of English Law

In general, law may be found to proceed from one or more of the following legal sources: from a written constitution, from legislation, from judicial precedent, from customs and from the writings of experts. English law proceeds chiefly from legislation and precedent.

The *corpus juris* is divisible into two parts by reference to the source from which it proceeds. One part consists of enacted law, having its source in legislation. The other part consists of case law, having its source in judicial precedents. The first part consists of the statute law to be found in the book and the other volumes of enacted law. The second part consists of the common law which is to be found in the volumes of law reports. Legislation is the making of law by the formal and express declaration of new rules by some authority in the body politic which is recognised as adequate for that purpose. A precedent is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts *ab extra*. Case law is developed within the courts themselves.

Salmond refers to two other legal sources in addition to legislation and precedent. Those are custom and agreement which are the sources of *customary law* and *agreement*.

Customary law is that which is constituted by those customs which fulfil the requirements laid down by law as the condition of their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law *inter partes*, in derogation of or in addition to the general law of the land.

By reference to their legal sources, there are four kinds of law:

- (i) Enacted law having its source in legislation.
- (ii) Case law having its source in precedent.
- (iii) Customary law having its source in custom.
- (iv) Conventional law having its source in agreement.

In addition to the above sources of law, *professional opinions* of eminent jurists may be called juristic law. Juristic writings

and professional opinions have played a very important role in the evolution of law. In England, the trend was set by Bracton and continued by such legal luminaries as Glanville, Chief Justice Coke and Blackstone. The works of Dicey and Cheshire are sources of private international law

Lord Wright once paid a tribute to Pollock's *Law of Torts* in *Nicholls v Ely Beet Sugar Factory Ltd*, (1936) 1 Ch 343.

In *Bradford v. Symondson*, the judgment turned almost entirely on the discussion of the books of leading text writers on insurance. In *Haynes v. Harwood*, the court followed a conclusion reached by Prof. Goodhart in an article written by him in the *Cambridge Law Journal*. Prof. Roscoe Pound explains the part played by textbooks in the development of American law in his book *The Formative Era of American Law*. His view is that doctrinal writing has had more influence in the United States than in England and even today that influence is continuing. *The American Restatement of the Law* is an example of cooperation between the bench, the profession and law teacher

### Sources of Law and Sources of Rights

The sources of law may also serve as sources of rights. By a source of law is meant some fact which is legally constitutive of right. It is the *de facto* antecedent of a legal right in the same way as source of law is *de facto* antecedent of a legal principle. Experience shows that to a large extent, the same class of facts which operate as sources of law also operate as sources of right. Some facts create law but not rights. Some facts create rights and not law. Some facts create both law and rights at the same time. The decisions of inferior courts are not sources of law but they are nevertheless sources of right. Immemorial custom gives rise to rights and law at the same time in certain cases. An agreement operates as a source of right. It is not exclusively a title of rights but also operates as a source of law.

### Ultimate Legal Principles

Ultimate legal principles are those self-existing principles of which no legal origin is known though it may be possible to trace them to some historical source. All rules of law have historical sources but all of them do not have legal sources. If that were

so, the search for tracing the origin of legal principles will continue *ad infinitum*. It is necessary that in every legal system there should be found certain ultimate principles from which all others are derived but which are self-existent.

### SUGGESTED READINGS

- |              |   |   |   |
|--------------|---|---|---|
| Allen        | · | <i>Law in the Making.</i>                       |   |
| Cardozo      |   | <i>The Growth of Law.</i>                       |   |
| Carter       | : | <i>Law, Its Origin, Growth and Function</i>     | · |
| Gray         | · | <i>The Nature and Sources of the Law</i> (1921) |   |
| Keeton       |   | <i>Elementary Principles of Jurisprudence</i>   |   |
| Salmond, J.W | · | <i>Jurisprudence.</i>                           | • |
| Silving, H   | : | <i>Sources of Law</i> , New York, (1968).       |   |



## IX

### LEGISLATION

The term 'legislation' is derived from two Latin words, *legis* meaning law and *latum* meaning to make, put or set. *Etymologically, legislation means the making or the setting of law.*

According to Salmond: "Legislation is that source of law which consists in the declaration of legal rules by a competent authority." According to Gray, legislation means "the formal utterances of the legislative organs of the society". According to Holland: "The making of general orders by our judges is as true legislation as is carried on by the Crown." Again, "in legislation, both the contents of the rule are devised, and legal force is given to it by acts of the sovereign power which produce written law. All the other law sources produce what is called unwritten law to which the sovereign authority gives its whole legal force, but not its contents, which are derived from popular tendency, professional discussion, judicial ingenuity or otherwise, as the case may be." According to Austin: "There can be no law without a legislative act." According to another writer, legislation consists in "the declaration of legal rules by a competent authority, conferring upon such rules the force of law". The term legislation is sometimes used in a wider sense to include all methods of law-making. When a judge establishes a new principle by means of a judicial decision, he may be said to exercise legislative powers and not judicial powers. However, this is not legislation in the strict sense of the term. The term legislation includes every expression of the legislature whether the same is directed to the making of law or not. An Act of Parliament may amount to nothing more than establishing a uniform time throughout the realm or altering the coinage.

#### **Legislation as Source of Law**

The view of the analytical school is that typical law is a

statute and legislation is the normal process of law-making. The exponents of this school do not approve of the usurpation of the legislative functions by the judiciary. They also do not admit the claim of custom to be considered as a source of law. The view of the historical school is that legislation is the least creative of the sources of law. To quote James Carter: "It is not possible to make law by legislative action. Its utmost power is to offer a reward or threaten a punishment as a consequence of particular conduct and thus furnish an additional motive to influence conduct. When such power is exerted to reinforce custom and prevent violations of it, it may be effectual and rules or commands thus enacted are properly called law; but if aimed against established custom they will be ineffectual. Law not only cannot be directly made by human action, but cannot be abrogated or changed by such action." According to this view, legislation has no independent creative role at all. Its only legitimate purpose is to give better form and make more effective the custom spontaneously developed by the people. Both the analytical school and the historical school go to extremes. The mistake made by the analytical school is that it regards legislation as the sole source of law and does not attach any importance to custom and precedent. The mistake of the historical school is that it does not regard legislation as a source of new law. Dean Pound points out that there are two types of legislation. Those are the organizing type and the creative type. The existence of the latter cannot be doubted in modern times when there is abnormal legislative activity.

### **Supreme and Subordinate Legislation**

According to Salmond, legislation is either supreme or subordinate. Supreme legislation is that which proceeds from the sovereign power in the State. It cannot be repealed, annulled or controlled by any other legislative authority. On the other hand, subordinate legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. However, there are other organs which have powers of subordinate legislation.

*Subordinate Legislation*

(i) Salmond refers to five kinds of subordinate legislation. As regards subordinate legislation in the colonial field, the powers of self-government entrusted to the colonies and other dependencies of the Crown are subject to the control of the imperial legislature which may repeal, alter or supersede any colonial enactment. However, it is to be noted that after the passing of the Statute of Westminster of 1931, the Dominion Legislatures have been given the power to make any law they please. No law passed by them after the Act of 1931 can be declared inoperative or void on the ground that it is repugnant to the law of England or any Act of Parliament. Every Dominion legislature has the power to repeal or amend any law.

(ii) In certain cases, legislative power has also been given to the judiciary. The superior courts are allowed to make rules for the regulation of their own procedure. It is a true form of legislation although it cannot create new laws by way of precedents.

(iii) Municipal authorities are also allowed to make bye-laws for limited purposes within their areas. According to Allen: "By a series of enactments, notably the Public Health Acts, 1875-1976, the Municipal Corporations Act, 1882 and the Local Government Acts, 1888-1933, local authorities—county, borough, rural and urban district councils—have powers to enact bye-laws binding upon the public generally, for public health and for 'good order and government'. Offences against these bye-laws are punishable on conviction by summary process by fines usually not exceeding £ 5. The range of subjects dealt with is immense: to take the commonest, we may note building, advertisements, care of the sick (hospitals, vaccination, infectious diseases), cleanliness of dwelling-houses, housing of the working classes, town-planning schemes, nuisances, scavenging and cleansing, police, rating, education, traffic, highways, burials, and the conduct generally of persons in public places. All these matters, and their many analogs in local government; count for no less in the daily lives of ordinary citizens than the enactments of Parliament. The far-off dignity of the House of Commons, though to the instructed it may symbolize the majesty of the Constitution, to the plain law-abiding man is but a name compared with the immediate discipline of magistrates, policemen, and inspectors."

(iv) Sometimes the State allows private persons like universities, railway companies, *etc.*, to make bye-laws which are recognized and enforced by law courts. Such legislation is usually called *autonomic*. The railway company may make bye-laws for the regulation of its undertaking. Likewise a university may make statutes for the government of its members.

*Delegated Legislation*: Another kind of subordinate legislation is executive legislation or *delegated legislation*. It is true that the main function of the executive is to enforce laws but in certain cases, the power of making rules is delegated to the various departments of the government. This is technically called subordinate or delegated legislation. Delegated legislation is becoming more and more important in modern times. To quote Baldwin: "In the three years from 1925-1928, the average number of Acts was 506, the average number of pages occupied by them 539; while the average number of Statutory Rules and orders was 1408.6 and the average number of pages covered by them was 1, 849."

Many factors have been responsible for the growth of delegated legislation. The concept of the State has changed and instead of talking of a police State, we think in terms of a welfare State. This change in outlook has multiplied the functions of the government. This involves the passing of more laws to achieve the ideal of a welfare State. Formerly, every bill used to be a small one but civilization has become so complicated that every piece of legislation has to be detailed. The rise in the number and size of the bills to be passed by Parliament has created a problem of time. It is realized that all this legislation cannot be enacted even if the members of Parliament are prepared to work day and night. The result is that Parliament resorts to the device of passing skeleton bills and leaving the work of filling in the details to the departments concerned.

Modern legislation is becoming highly technical and it is too much to expect that the ordinary members of Parliament will appreciate all the implications of modern legislation. Except a few experts in certain lines, the other members of Parliament are bound to bungle if they attempt to do the impossible. Under the circumstances, it is considered safe to approve of general

principles of legislation and leave the details to the ministries concerned.

The time available for drafting bills to be passed into law by Parliament is not adequate. If an attempt is made to draft detailed bills within a short period, the drafting is bound to be defective. No wonder power is delegated to the departments concerned to issue orders-in-council which can be made at leisure and which can be expected to be logical and intelligible.

It is impossible for any statesman or civil servant to foresee all contingencies that might arise in the future and provide for them in the bill when it is being passed by Parliament. It is convenient if some power is given to the department concerned to add to the details to meet any contingency in future. Moreover, full knowledge of the local conditions may not be available to the government at the time of the passing of the law and it is desirable to adjust the law by means of orders-in-council to meet the requirements of the various localities. Delegated legislation gives flexibility to law and there is ample scope for adjustment in the light of experience gained during the working of any particular legislation.

Delegated legislation is controlled in the following ways :

(a) *Parliamentary Control*: Parliament has always general control. When a bill is before it, it can modify, amend or refuse altogether the powers which the bill proposes to confer on a minister or some other subordinate authority.

(b) *Parliamentary Supervision*: A second way of controlling delegated legislation is that laws made under delegated legislation should be laid before the legislature for approval and the legislature may amend or repeal those laws if necessary.

(c) *Judicial Control*: While parliamentary control is direct, the control of courts is indirect. Courts cannot annul subordinate enactments, but they can declare them inapplicable in particular circumstances. The rule or order frowned on by the courts, though not actually abrogated, becomes a dead letter because in future no responsible authority will attempt to apply it. If it is applied, nobody will submit to it. Judicial control operates through the doctrine of *ultra vires*. All delegated legislation is subject to

the test whether or not it falls within the periphery of the power thus conferred. If they do not, they are of no effect. Courts also possess certain direct power over the acts and procedures of public authorities. The most important of them are called writs. The other methods are injunctions and declarations.

(d) *Trustworthy Body*: An internal control of delegated legislation can be ensured if the power is delegated only to a trustworthy person or body of persons.

(e) *Publicity*: Public opinion can be a good check on the arbitrary exercise of delegated statutory powers. Public opinion can be enlightened by antecedent publicity of the delegated laws.

(f) *Expert's Opinions*: In matters of technical nature, opinions of experts should be taken. That will minimise the danger of vague legislation and "blanket" delegation.

C.T. Carr has suggested certain safeguards to avoid the evils of delegated legislation which is otherwise inevitable. Delegation of legislative powers should be made to a trustworthy authority. The limits within which the delegated powers are to be exercised should be defined clearly and the courts should be given the power to declare any piece of delegated legislation as *ultra vires*, which is beyond the power given to the authority concerned. The particular interests involved should be consulted by the authority concerned at the time of issuing orders-in-council. There should be antecedent publicity for delegated legislation and also for amending or revoking delegated legislation. The rules and regulations made under delegated legislation should be put before the legislature before they come to have the force of law. If they are not approved by the legislature they must lapse. Expert advice should also be taken at the time of making rules and regulations. All delegated legislation must be subject to judicial control and review. It must not be repugnant to the statute under which it is made. It must not be vague or uncertain. It must not be unreasonable. It must be allowed to be controlled by the courts by means of appropriate writs.

### **Legislation and Precedents**

It may be desirable to compare legislation with precedents and customary law. As regards legislation and precedents, the

former has its source in the law-making will of the State. On the other hand, precedent has its source in the *ratio decidendi* and *obiter dicta* of the judicial decision. Legislation is imposed on courts by the legislature but precedents are created by the courts themselves. Legislation is the formal and express declaration of new rules by the legislature, but precedents are the creation of law by the recognition and application of new rules by courts in the administration of justice. It is a judicial decision which provides a rule of law for subsequent decisions. Legislation creates statute law and precedents create judge-made law. Legislation comes before a case arises requiring its application. Precedent comes after the cause has arisen. Legislation is expressed in a general and comprehensive form but precedent is in a particular and limited form. Legislation is abstract but precedent is definite. However, a precedent primarily settles a particular dispute between definite parties. It is easy to interpret a statute than to interpret a precedent. While legislation is ordinarily prospective, precedent is retrospective only.

### Legislation and Custom

As regards legislation and customary law, legislation grows out of theory but customary law grows out of practice. While the existence of legislation is essentially *de jure*, the existence of customary law is essentially *de facto*. Legislation is the latest development of law-making tendency, customary law is the oldest form of law. Legislation is the mark of advanced society and a mature legal system. Customary law is the mark of primitive society and an undeveloped legal system. Legislation expresses a relationship between men and the State but customary law expresses the relationship between man and man. Legislation is complete, precise and easily accessible, but the same cannot be said about customary law. Legislation is *jus scriptum* but customary law is *jus non scriptum*. Legislation is the result of a deliberate positive process but customary law is the outcome of necessity, utility and imitation. According to Keeton: "In early times, legislation either defined or supplemented custom, today the relative positions of custom and legislation have been reversed. Statute law is the principal source of modern law; custom only persists where legislation has as yet not penetrated. . . . Legislation, stripped of all divine associations, is really a very convenient method of making

law. It is quickly made, definite, easy of access, and easy to prove. However, since the development of representative institutions, it may be regarded as the closest approximation to the general will that can be secured. Custom, on the other hand, requires many years to form, is rarely absolutely clear, and is in consequence more difficult to prove. To repeal a statute, it is merely necessary to pass another one, avoiding it. To repeal a custom by desuetude is a long and extremely uncertain business. It is always much more convenient to repeal a custom by statute."

According to Allen: "The difference between custom and legislation as sources of law is manifest. The existence of the one is essentially *de facto*, of the other essentially *de jure*. Legislation is therefore the characteristic mark of mature legal systems, the final stage in the development of law-making expedients. In short, while custom expresses a relationship between man and man, legislation expresses a relationship between man and State. It cannot exist until the notion of a central State, whether or not it be 'sovereign' in the conventional sense, has crystallized. It may be objected that we have been taught for many years past that legislation, in the form of codes, is one of the earliest sources of law. But this is legislation in a very different sense. It does not proceed from anything which modern theory has taught us to regard as 'sovereign', but usually from a source deemed to be either divinely inspired or itself divine."

### **Advantages of Legislation over Precedent**

Legislation as a source of law has many advantages over precedent.

(i) Legislation is both constitutive and abrogative, but precedent is merely constitutive. Legislation is not only a source of new law but also the most effective instrument of abolishing the existing law. Abrogative power is necessary for legal reform and this virtue is not possessed by precedent which can produce new law but cannot reverse that which is already law. Legislation is a necessary instrument not only for the growth of law but also for its reform.

(ii) Legislation is based on the principle of division of labour and consequently enjoys the advantage of efficiency. The legislative and judicial functions are separated and consequently both of



them are done better by different organs. Legislature attends to the work of legislation and judiciary attends to the work of interpreting and applying the law. In the case of precedent, the functions of legislation and interpretation are combined and that is hardly desirable

(iii) Legislation satisfies the requirement of natural justice that laws shall be known before they are enforced. Law is declared in the form of legislation and the same is later on enforced by the courts. Law is formally declared to the people and if after that they dare to violate the same, they are punished. However, that is not the case with precedent. It is created and declared in the very act of applying and enforcing it. There is not any formal declaration of precedent. It is applied as soon as it is made. It operates retrospectively and applies to facts which are prior in date to law itself. However, it is pointed out that modern statutes are so numerous and so complicated that it is doubtful whether their promulgation secures wider knowledge of the new principles than any important decision. In any case, until they have been construed by actual decisions, their effect is doubtful. Moreover, there is nothing in the nature of legislation to prevent it from having a retroactive effect so as to alter the legal consequences of acts already done. Any considerable alteration of principles must have some retroactive effect as long-term arrangements will have been entered into on the assumption that law will remain unchanged.

(iv) Legislation makes rules for cases that have not yet risen but precedent must wait until the actual concrete incident comes before the courts for decision. Precedent is dependent on the accidental course of litigation but legislation is independent of it. A precedent must wait till such time as a case is brought for decision before a court of law. Legislation can move at once to fill up the vacancy or settle a doubt in the legal system.

(v) Legislation is superior in form to precedent. It is brief, clear, easily accessible and knowable. Case-law is buried from sight and knowledge in the huge and daily growing mass of the records of litigation. "Case-law is gold in the mine, a few grains in the precious metal to the tons of useless metal, while statute law is coin of the realm ready for immediate use." However, it is pointed out that it is not true in the case of English statute law.

Sometimes, the statutes are so drafted as to simplify the law, but usually important statutes require elaborate editing with copious references to cases as soon as they are enacted. Reference may be made in this connection to the Local Government Act, 1833. It is true that continental codes have facilitated the scientific arrangement of legal topics, but even they have proved unworkable without much comment and the guidance of successive decisions. The constantly increasing bulk of reported cases on the existing law is proving to be a burden everywhere.

According to Prof. Friedmann: "It will be difficult to deny that in modern circumstances development of law through precedent is slow, costly, cumbrous and often reactionary. It is therefore less suitable for a time of fast changes and restlessness such as ours. It is also dependent upon a continuity and steadiness of social conditions which may not last. Perhaps none but British judges could have worked it in such a way as to make it withstand, at least partially, the onslaught of centuries. Many present-day judges find that the only way of preserving the system is to take a bold attitude towards antiquated precedents, and to form the law in terms of broad principles. But others take the view that law reform should be left to the legislator. As a result the judicial approach to law reform, under a precedent system, is increasingly uncertain, and more influenced by changes in the judicial personnel than a code law system. Consequently the sphere left to judicial law-making diminishes steadily, even if it tries to engraft itself upon statutory interpretation." (p. 492, *Legal Theory*).

### **Advantages of Precedent over Legislation**

(i) Precedent also has certain advantages over legislation. According to Dicey: "The morality of the courts is higher than the morality of the politicians." Politicians are always swayed by popular passions and are liable to make bad laws. On the other hand, judges decide cases in a calm atmosphere and can afford to hold the scales even between the contending parties. They perform their functions impartially and fearlessly.

(ii) According to Salmond, case law enjoys greater flexibility than statute law. Statute law suffers from the defect of rigidity. Courts are bound by the letter of law and are not allowed to

ignore the same. In the case of precedent, analogical extension is allowed. It is true that legislation as an instrument of reform is necessary but it cannot be denied that precedent has its own importance as a constitutive element in the making of law although it cannot abrogate law. In the case of England, the courts of equity played an important part in mitigating the rigours of common law by means of precedents.

(iii) According to Amos, law does not become more uncertain when it is based on precedents than when it is founded on enacted law. Although French law is codified, it is still far from being uncertain. The uncertainty of English law is nothing when compared to that of France. A French advocate has to wade through a set of French codes, interpretations and commentaries as an English lawyer has to do. The enactment of a law is no cure for uncertainty in a legal system. Neither legislation nor precedent alone can completely meet all eventualities. The gaps have to be filled by legislation and precedents.

According to Gray, case law is not only superior to statute law but all law is judge-made law. To quote him: "In truth, all the law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute." (*The Nature and Source of the Law*).

It is submitted that in the present age, both legislation and precedent are equally important and one cannot attain its end without the other. The aim of the law is the protection and progress of society and individual. For a planned progress, legislation is necessary. To interpret it and to apply and to adapt it to a particular case, case law is equally necessary. Both legislation and precedents contribute equally to the development of law.

### **Codification**

According to the *Oxford Dictionary*: "Code is a systematic collection of statutes, body of laws, so arranged as to avoid inconsistency and overlapping." This definition of codification is not exhaustive because it does not include common law and case law. In fact, codification is the systematic process and reduction of the whole body of law into a code in the form of enacted law.

Codification implies collection, compilation, methodical arrangement, systematization and reduction to coherent form the whole body of law on any particular branch of it so as to present it in the form of a systematic, clear and precise statement of general principles and rules.

There have been codes since very ancient times. In India, we had not only the Code of Manu but also the Codes of Yajnavalkya, Brihaspati, Narada and Parashar. The Code Justinian is a very important ancient code of Roman law. In many respects, it is like a modern code. Justinian compiled the mass of laws which existed in various forms such as the Praetor's edicts, the writings of classical jurists etc. The other important ancient codes were the Jewish Code, the Chinese Code, the Code of Hammurabi etc. In the beginning of the 19th century, Napoleon gave what is called the Code Napoleon. Bentham pleaded for codification in England. He was supported by Thibaut but opposed by Savigny. Sir Henry Maine also advocated codification in England. More work has been done in this direction in the present century. The law of property, in most parts, has been codified. Many archaic, outdated and artificial rules have been eliminated and law has been put in a very clear, simple and systematic form.

As regards India, the first Indian Law Commission was appointed with Lord Macaulay as its Chairman under the provisions of the Charter Act of 1833. The result was the drafting of a number of codes such as the Indian Penal Code, the Civil Procedure Code and the Indian Limitation Act. A Second Law Commission was set up under the Charter Act of 1853. The Indian Penal Code was passed in 1860. Later on, the Criminal Procedure Code and some other Acts were drafted and passed. Law Commissions were set up again in 1861 and 1879 which drafted and revised many Acts. The result was that the criminal law, civil law in most parts, and procedural laws were codified by the beginning of the present century. After the independence of India in 1947, the Indian Law Commission was appointed to make recommendations about laws and their administration. The Indian Law Commission has made comprehensive and voluminous recommendations on various aspects of law in India.

Certain conditions are necessary for the codification of law. According to Roscoe Pound, the following important conditions lead to codification :

(i) The exhaustion for the time being of the possibilities of juristic development of existing legal materials, or where the legal institutions have become completely mature, or where the country has no juristic past, the non-existence of such material.

(ii) The unwieldiness, uncertainty and archaic character of the existing law.

(iii) The development of an efficient organ of legislation. The need for one uniform law in a political community whose several sub-divisions had developed or received divergent local laws.

### *Kinds of Codification*

Codes may be of the following kinds :

(i) A creative code is that which makes a law for the first time without any reference to any other law. It is law-making by legislation. The Indian Penal Code belongs to this category.

(ii) A consolidating code is that code which consolidates the whole law—statutory, customary and precedent—on a particular subject and declares it. This is done for systematising and simplifying the law. The Code of Justinian belongs to this category. The same is the case with the Indian Transfer of Property Act, 1882.

(iii) A code may be both creative and consolidating. It may make new law as well as consolidate the existing law on a particular subject. The recent legislation in India on Hindu law is an example of this kind.

### *Merits*

(i) The one great merit of codification is that law can be known with certainty. The law of contract in India can be found by a reference to the Indian Contract Act. Likewise, the rules of evidence in the country can be known by a study of the Indian Evidence Act. The certainty of law avoids confusion in the public mind.

(ii) Another advantage of codification is that the evils of judicial legislation can be avoided. According to Macaulay, judge-made law in a country where there is an absolute govern-

ment and lax morality—where there is no Bar and no public—is a curse and scandal not to be endured” According to Sir James Stephen: “Well—designed legislation is the only possible remedy against quibbles and chicanery. All the evils which are created from legal practitioners can be averted in this way and in no other. To try to avert them by leaving the law undefined and by entrusting judges with a wide discretion, is to try to put out the fire by pouring oil upon it. Leave a judge with no rule or with one of those leaden rules which can be twisted in any direction, and you at once open to the advocate every sort of topic by which the discretion of the judge can be guided Shut the lawyer’s mouth and you fall into the evils of arbitrary government.”

(iii) Codification is necessary to preserve the customs which are suited to the people of a country According to Rattigan: “To codify, on the other hand, the existing customs would perpetuate that system or retard its break-up We should, therefore, not be hampering a healthy development but avoiding a disastrous tendency to disruption We should not be asphyxiating progress to ensure the prosperity of agricultural classes by preserving for them the position of their lands and the constitution of their communities. We should not be introducing any novel or distasteful legislation but doing our best to maintain all that was healthy and good in a system which was suited to the people.”

(iv) The codification of law is necessary to bring about a sense of unity in the country. To quote a Despatch of the Government of India to the Secretary of State for India: “We feel that the reduction to a clear, compact and scientific form of the different branches of our substantive laws which are still uncodified, would be a work of the utmost utility; not only to the judges and the legal profession but also to the people and the government It would save labour and thus facilitate the despatch of business and cheapen the cause of litigation; it would tend to keep our untrained judges from errors; it would settle disputed questions on which our superior courts are unable to agree; it would preclude the introduction of technicalities and doctrines unsuited to this country; it would perhaps enable us to make some urgently needed reforms without the risk of existing popular opposition

and it would assuredly diffuse among the people of India the more accurate knowledge of rights and duties than they will ever attain if their law is left to its present stage."

### *Demerits*

(i) Codification is not an unmixed blessing. It has its demerits also. Codification brings rigidity into the legal system. It cramps and impedes the free and natural growth of law. The law becomes petrified at the stage at which it is codified. According to Cardozo: "The inn that shelters the traveller for the night is not the journey's end. The law, like the traveller, must be ready for tomorrow. It must have a principle of growth." According to Roscoe Pound: "Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of changes no less than principles of stability. Accordingly, the chief problem to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law affording no scope for individual wilfulness, with the idea of change and growth and making of new law; how to unify the theory of law with the theory of law-making and to unify the system of legal justice with the facts of administration of justice by magistrates." According to Cockburn: "Whatever disadvantages attach to any unwritten law, and of these we are fully sensible, it has at least this advantage that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." According to Sir James Stephen: "Those who consider that codification will deprive the common law of its

elasticity appear to think that it will hamper the judges in the exercise of a discretion, which they are at present supposed to possess, in the decision of new cases as they arise."

(ii) Codification results in the regimentation of the life of the people. A code gives a uniform law to the whole country. It does not bother about the differences in the sentiments, convictions, aspirations, customs and traditions of the people living in different parts of the country. Unfortunately, the various classes in society do not run on the same road at the same speed. The result is that liberty and individuality are sacrificed at the altar of uniformity.

(iii) A code is the work of many persons and no wonder the provisions of a code are found to be incoherent. However, if the work is done by competent persons, this defect can be avoided to a great extent.

(iv) Codification makes the law simple and thereby enables the knaves to flourish. They know the law and before committing a crime, they can provide against the same. According to Savigny, a code makes the defects of law obvious and thereby encourages the knaves to take advantage of them. However, it is pointed out that there are greater chances for knaves when the law is not clear. Uncertainty of law is more to their advantage.

(v) A code is likely to disturb the existing rights and duties of the people by creating new rights and duties in place of the old ones. It disturbs the fabric of legal order and creates confusion and uncertainty.

(vi) Critics point out that the codes of France and Germany have failed and consequently it is useless to have them. However, it is not correct to say that all codes have failed. It is rightly pointed out by Sir James Stephen that Indian Codes have been "triumphantly successful". According to Chalmers: "All the continental nations have codified their laws and none of them show any sign of repenting it. On the contrary, most of them are now engaged in remodelling and amplifying their existing Codes. In India, a good deal of codification has been carried on, and public and professional opinion seems almost unanimous in its favour."

(vii) No code can be complete and self-sufficing. In course of



time, every code is overlaid with an accumulating mass of comment and decisions. However, this defect can be avoided by revising the code from time to time. To quote Lord Macaulay: "The publication of this collection of cases decided by the legislating authority will, we hope, greatly limit the power which the courts of justice possess of putting their own sense on the laws. But we are sensible that neither this collection nor any other can be sufficiently extensive to settle every question which may be raised as to the construction of the code. Such questions will certainly arise, and unless proper precautions be taken, the decisions on such questions will accumulate till they form a body of law of far greater bulk than that which has been adopted by the legislature... it is most desirable that measures should be taken to prevent the written law from being overlaid by immense weight of comments and decisions."

According to Savigny, if an age is capable of producing a good code, no code is necessary in that case. The work of a code can be done by the jurists, lawyers and private expositors. However, it cannot be denied that such expositions lack authority and certainty and the judges are not bound to follow them.

According to Salmond: "The advantages of enacted law so greatly outweigh its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process known since Bentham as codification."

According to Portalis: "Whatever is done, positive laws can never entirely replace the use of natural reason in the affairs of life. The needs of society are so varied, social intercourse is so active, men's interest are so multifarious, and their relations so extensive, that it is impossible for the legislator to provide for everything.

"It is then, to the course of decision (*la jurisprudence*) that we leave (1) rare and extraordinary cases which cannot enter into a reasonable legislative plan, (2) details too variable and contentious to occupy the legislator and (3) all those objects which it would be a useless effort to anticipate, or of which premature anticipation would be dangerous.

"It is for experience to fill progressively the gaps we leave.

The code of a people makes itself with time ; properly speaking it is not made."

It is contended that most of the demerits of codification have been magnified and exaggerated. It is true that there are some demerits of codification but those are insignificant as compared with its merits. Codification enables the planned development of law. It enables the law to fulfil its purpose. Most of the demerits of codification are due to a mistaken view that codification means the complete abolition of case law and customary law. It cannot be denied that case law will always work as a supplement to the code. However carefully a code may be drafted, some defects are bound to remain. If case law functions side by side with the code, most of its demerits would disappear. If the code does not go hand in hand with case law, it would become difficult to use it in a short time. The Codes of Justinian and Napoleon were materially changed in their practical application. The *Restatement of American Law* prepared by the American Law Institute is a beautiful compromise between codification and case law. It declares the existing law and on points where there is any conflict, it adopts the view it prefers. It commands great respect in the courts of America although it has no sanction from the State.

Codification has become very necessary in modern times. It is the most potent means of legal development. That is why the method of codification is being adopted in all parts of the world.

## Rules of Interpretation

### *Grammatical Interpretation*

According to Salmond: "By interpreting or construction is meant the process by which the courts seek to ascertain the meaning of legislation through the medium of the authoritative forms in which it is expressed." Salmond refers to two kinds of interpretations, *grammatical* and *logical*. In the case of *grammatical interpretation*, only the verbal expression of law is taken into consideration and the courts do not go beyond the *littera legis*. In the case of *logical interpretation*, the courts are allowed to depart from the letter of the law and try to find out the true intention of the legislature. It is the duty of the courts to discover and act upon the *true intention* of the legislature. In all ordinary cases, it is the

duty of the courts to content themselves by accepting the grammatical interpretation as the true intention of the legislature. It should be taken for granted that the legislature has said what it meant and meant what it has said. 'The judges are not at liberty to add to or take away from or modify the letter of the law simply because they feel that the true intention of the legislature has not been correctly expressed in the law itself. In all ordinary cases, grammatical interpretation is the only interpretation allowable.

In the *Sussex Peerage* case, it was rightly observed that "if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the law-giver." According to Lord Brougham: "The construction of an Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the legislature. We cannot aid the legislature's defective phrasing of the statute. We cannot add and mend and by construction make up deficiencies which are left there. And, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply the meaning and supply the defect in the previous Act." According to Lord Wensleydale: "In construing statutes, as in considering all other written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." According to Paulus, the Roman jurist: "Where there is no ambiguity in the words, the question of intention ought not to be admitted."

Salmond refers to three logical *defects* by which grammatical interpretation may be affected: (i) The first defect is that of *ambiguity*. The language of a statute may be such that instead of having one meaning, it may be possible to put two or more meanings on the same word. In such cases, it is the right and duty of the courts to go behind the letter of the law and try to find out the true intention of the legislature. When two meanings are possible,

that which is more natural, obvious and consonant with the ordinary use of language should be put. (ii) Another defect is that of *inconsistency*. The different parts of the law may be inconsistent with one another and thereby destroy and nullify their meaning. In such a case, it is the duty of the courts to find out the true intention of the legislature and correct the letter of the law. (iii) Another logical defect may be that law in itself is *incomplete*. There may be some lacuna in the law itself and that may not allow the whole meaning to be expressed. In such cases, the defect can be remedied by logical interpretation and not grammatical interpretation. However, the omission in the law must be such as to make the same incomplete logically. If law is logically complete, the courts have no business to interfere with the same. Their duty is merely to apply the letter of the law and not to alter the same to suit their reasoning. They are not entitled to assume legislative powers.

*Golden Rule* :— Though the literal interpretation must be accepted, it must be applied very cautiously. It should not be followed if the statute is apparently defective. The literal interpretation is a means to ascertain the general purport of the statute or *ratio legis*. In the difficult cases, the court may go beyond the words of the statute and take help from other sources. This rule is called the Golden Rule. Austin and Korkunov have approved of this rule. It has been followed by eminent judges in their decisions. It has been summarised by Parke in these words: "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further."

In *Additional Commissioner of Income Tax v. Surat Art Silk Cloth Manufacturers' Association*, the Supreme Court of India emphasized the role of beneficent construction of statutes. It was held that a construction that gives meaning and effect to the provisions of a statute is definitely to be preferred. In the course of its judgment, the Supreme Court observed: "If there is one rule of interpreta-

tion more well settled than any other, it is that if the language of a statutory provision is ambiguous and capable of two constructions, that construction must be adopted which will give meaning and effect to the other provisions of the enactment, rather than that which will give none." [ (1980) 2 SCC 31 ].

In the United States also, there is a trend towards a purpose-oriented interpretation rather than a plain-meaning interpretation. In the *United States v. American Trucking Association*, the Supreme Court of America observed: "When the plain meaning has led to absurd or futile results, this court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results, but merely an unreasonable one, plainly at variance with the policy of legislation as a whole, this court has followed that *purpose* rather than the literal words."

However, penal statutes must always be construed strictly. If an Act creates an offence and also prescribes a penalty for its violation, the words used in the Act must be strictly construed. In such cases, the court is not so much concerned with what might possibly have been intended, but with what has actually been said and the language used in the Act. If in a penal statute, two possible and reasonable interpretations can be given, the court must lean towards that construction which exempts the person from a penalty rather than that which imposes penalty.

*The Mischief Rule* :—When the true intention of the legislature cannot be determined by the language of the statute in question, it is open to the court to consider the historical background underlying the statute. The court may consider the circumstances that led to the introduction of the bill and also to the circumstances in which it became law. When judges are allowed to probe into questions of policy in interpreting statutes, there is bound to be some uncertainty. It is maintained that judges may look at the law before the Act and the mischief in the law which the statute was intended to remedy. The Act is to be construed in such a manner as to suppress the mischief and advance the remedy. This rule of interpretation is known as the mischief rule. It takes its origin from *Heydon's case*. In that case, it was observed that for the sure and true interpretation of all statutes, "four things are

to be discussed and considered ; first, what was the common law before the making of the Act ; second, what was the mischief and defect for which the common law did not provide ; third, what remedy the Parliament hath resolved and appointed to cure the disease ; fourth, the true reason of the remedy, and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle invasions and evasions for continuance of the mischief...and to add force and life to cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

In *Gorris v. Scott*, a newly enacted statute provided that animals carried on board a ship should be kept in pens. The defendant shipping company had failed to enclose the plaintiff's sheep in pens, and sheep had been washed overboard during a storm. If only the sheep had been penned as required, this mishap would not have occurred. However, the English court rejected the plaintiff's suit for breach of statutory duty on the ground that this Act had been passed to prevent infection from spreading from one owner's animals to those of another and should not therefore be used to provide a remedy for a totally different 'mischief'."

In *Vishesh Kumar v Shanti Prasad*, the Supreme Court observed that that construction should be adopted which would advance the object of the legislature and suppress the mischief sought to be cured. [ (1980) 2 SCC 378 ].

Though the mischief rule sounds very reasonable, it has not received much favour in English courts which lean more towards literal interpretation. Generally, the rule has not been followed in England and in some cases it has been criticised even.

### *Logical Interpretation*

Logical interpretation is to be put on a statute only when grammatical or literal interpretation is not possible. In such cases, the true intention of the legislature has to be found out by referring to other facts. If the words are ambiguous, that interpretation is to be preferred which prevents the law from becoming absurd and dead letter. In the case of two or more alternative interpretations, that interpretation is to be preferred which is required to fulfil the object of law itself. According to Gray:

“Logical interpretation calls for the comparison of the statute with other statutes and with the whole system of law and for the consideration of the term and circumstances in which the statute was passed ” According to Allen: “Nowhere it is more apparent than in the construction of enactments that words ‘half reveal and half conceal the thought within’. Unfortunately, a statute must be of revelation and in nowise concealment, if it is to avoid a darkening counsel. In the task of liberal or grammatical interpretation, judges are constantly reminded to their unfeigned chagrin of the imperfection of the human language. The style of statute has differed greatly from age to age.”

The logical method takes into consideration the historical facts and the needs of society. It is the duty of the court to consider the circumstances under which the law was passed and the mischief which it was intended to remedy. Only that interpretation should be put which is liable to suppress the mischief and help the cause of remedy. However, courts are not allowed to refer to the debates on the bill, the fate of amendments proposed and dealt with by the legislature.

In the case of logical interpretation, it is the duty of the courts to take into consideration the object of the Act and the needs of society. That interpretation is to be put which advances the cause of justice. According to Kohler: “Rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically; they are to be interpreted as products of the whole people whose organ the law-maker has become.” According to Cardozo: “Formerly men looked upon law as the conscious will of the legislator. Today, they see in it a natural force. It is no longer in text or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity that certain consequences shall be attached to give hypotheses. The legislator had a fragmentary consciousness of this law, he translated it by the rules which he describes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source, that is to say, in the exigencies of social life. There resides the strongest probability of discovering the sense of the law. In the same way, without the question of supplying the gaps in the law, it is not of

logical deduction, it is rather of social needs, that we are to ask the solution."

It cannot be denied that both the grammatical and logical interpretations are equally important. They have been compared to two footsteps required for walking on the road. The help of both of them is essential for interpreting statutes. To quote Salmond: "The maintenance of a just balance between the competing claims of these two forms of interpretations is one of the most important elements in the administration of statute law. On each side there are dangers to be avoided. Undue laxity on one hand sacrifices the certainty and uniformity of the law to the arbitrary discretion of the judges which administer it, while undue strictness on the other hand sacrifices the intent of the legislature and the rational development of the law to the tyranny of words."

#### *Strict and Equitable Interpretation*

When the *littera legis* suffers from ambiguity, it usually happens that one of the meanings is more obvious and consonant with the popular use of the language. If this meaning is adopted, the interpretation is called strict or literal. Sometimes, courts reject the natural and most known interpretation in favour of another which conforms better to the intention of the legislature though it may not fit in with the ordinary use of language. When that is done, there is equitable interpretation.

#### *Restrictive and Extensive Interpretation*

Equitable interpretation is either restrictive or extensive, according as it is narrower or wider than the literal interpretation. The rule of restrictive interpretation is applied to penal and fiscal statutes. These laws impose restraints on the liberty of an individual or on the enjoyment of property by him. In such cases, courts are against a construction which imposes a greater burden on the subject than is warranted by the literal meaning of the language employed in the statute. *Nisbet v. Rayne and Burn* is an example of extensive interpretation. In that case, Nisbet was a cashier of the defendants, a firm of coalmine owners. It was a part of his duty to take every week from his office to the colliery the cash out of which the wages of the employees at the colliery were paid. While doing so, Nisbet was robbed and murdered.



His widow claimed damages under the Workmen Compensation Act, 1906. Section I of that Act provides that when a workman meets his death by an accident arising out of the course of his employment, his widow may claim damages from the employers. It was contended in that case that murder was not an accident within the meaning of the Act and hence the claim was groundless. Lord Justice Kennedy agreed with the view that "the description of death by murderous violence as an accident cannot honestly be said to accord with the common understanding of the word." However, he observed: "I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, 'any unforeseen and untoward event producing personal harm', than to exclude from the operation of the section a class of injury, which it is quite unreasonable to suppose that the legislature did not intend to include within it." This is a case of extensive interpretation.

### *Historical Interpretation*

The method of historical interpretation is employed while interpreting a statute when its language gives no clue to the intention of the legislature. What is done is that courts consider the circumstances attending the original enactment and give effect to the intention which the legislature would presumably have expressed if its attention had been drawn to the particular question. In *Heydon's* case, it was laid down that "for the sure and true interpretation of all statutes in general, be they penal or beneficial, restricting or enlarging the Common Law, four things are to be discussed and considered: first, what was the Common Law before the making of the Act; second, what was the mischief and defect for which the Common Law did not provide; third, what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth; fourth, the true reason of the remedy; and the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy and suppress subtle inventions and evasions for continuance of the mischief." However, it is worthy of notice that historical interpretation cannot be adopted in every case. Even while ascertaining the supposed intention of the legislature, the courts cannot travel out of the

language used in the statute. The result is that the proceedings in the legislature or the history of the introduction of a particular clause in the statute in the legislature cannot be considered. In *Rhonda's* case, Lord Birkenhead observed: "The words of the statute are to be construed so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied and the defects to be amended, may legitimately be looked at together with the general scheme of the Act." In the same case, Lord Wrenbury observed: "The debate upon the bill, the fate of amendments proposed and dealt in Committee of either House cannot be referred to, to assist in construing the language of the Act as ultimately passed into law with the Royal assent."

### *Sociological Interpretation*

The jurists of the sociological school are prepared to give a lot of freedom to the judges while interpreting a statute. The view of Kohler is that for the determination of the correct interpretation, courts can properly refer to the history of social movements and enquire into the social needs, objects and purposes which were agitating the society at the time of the legislation and which the statute had in view. To quote him: "The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from Jurisprudence. Hence the principal rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the white people whose organ the law-maker have become." Benjamin Cardozo writes: "Formerly men looked upon law as the conscious will of the legislator. Today they see in it natural force . . . . It is no longer in texts or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity by that certain consequences shall be attached to given hypothesis. The legislator had a fragmentary consciousness of this law: he translates it by the rules which he prescribes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source; that is to say, in the exigencies

of social life. There resides the strongest probability of discovering the sense of the law. In the same way when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs that we are to ask the solution." It is worthy of notice that the method of sociological interpretation has so far not been recognized by the courts. However, in course of time it is bound to have its own place in the rules of interpretation.

### *Equity of a Statute*

The principle of "equity of a statute" is defined by Coke in these words: "Equity is a construction made by the judges that cases out of the letter of a statute yet being within the same mischief or cause of making the same, shall be within the same remedy that the statute provideth; and the reason thereof is for that the law-makers could not possibly set down all cases in express terms." In the case of *Riggs v. Palmer*, it was held that a murderer could not be permitted to take under the will of his victim and transmit rights to his own heirs, although the statutes regulating the devolution of property by will, if literally construed, did not stand in the way of the murderer benefiting by the testamentary disposition of his victim. To quote: "If the law-makers could, as to this case, be consulted, would they say that they intended by the general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property." The principle of equity of statute is not favoured by the courts. They are not prepared to fill in lacunae left by the legislature.

### *Rule of Casus Omissus*

The rule of *casus omissus* provides that omissions in a statute cannot, as a general rule, be supplied by construction. In the case of *Parkinson v. Plumptre*, the Catering Wages Act, 1943 prescribed minimum wages payable to workers in catering establishments. The schedules to the Act provided for minimum wages when the employer supplied the worker with full board and lodging and when the employer supplied the worker with neither full board nor lodging. In that case, the plaintiff was a worker in a catering establishment. She was provided with full board but not lodging. She claimed that she was paid less than the

minimum wage payable under the Act. While dismissing the claim, Lord Goddard observed: "I think there is a *casus omissus*, and that the draftsman has forgotten to provide for the case where, as here, board is provided, but not lodging within the meaning of the schedule. I suppose it was thought that full board would only be supplied when lodgings were provided, and, as I have said, lodging seems to be put out of account here. These people were there full time, and so, therefore, you have got this unfortunate hiatus. One always tries to construe words so as to give them a sensible construction and prevent their failure, but I do not know of any canon of construction which enables me to construe 'where the employer supplies the worker with neither board nor lodging' to include a case where the employer supplies full board but no lodging. I can't rewrite the legislation. I must enter judgment for the defendant." (1954) 1 All ER 201.

### Rules of Interpretation of Statutes

There are certain well-known rules of interpretation of statutes.

(1) According to Lord Simon: "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. We must not shirk from an interpretation which will reverse the previous law, for the purpose of a large part of our statute is to make lawful that which would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinion of sound policy so as to modify the plain meaning of statutory words, but where, in constrained general words, the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

(2) The statute must be read as a whole and construction should be put on all parts of the statute. According to Lord Halsbury: "You must look at the whole instrument inasmuch as

there may be inaccuracy and inconsistency; you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it " According to Lord Davey: "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

(3) The statute should be construed in a manner to carry out the intention of the legislature. According to Lord Blackburn: "I quite agree that in construing an Act of Parliament, we are to see what is the intention which the legislature has expressed by the words, but then the words again are to be understood by looking at the subject-matter they are speaking of and the object of the legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced " According to Lord Radcliffe: "There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention." The fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded "according to the intent of them that made it" According to Lord Simond: "The duty of the court is to interpret the words the legislature has used, those words may be ambiguous. But even if they are, the powers and duty of the court to travel outside them on a voyage of discovery are strictly limited, see for instance, *Assam Railways and Trading Co. v. I. R. C.* and particularly the observations of Lord Wright." It is not the duty of courts to fill up the gaps in a statute To do so is to usurp the legislative function under the thin disguise of interpretation. If a gap is discovered, it is for the legislature to fill up the same

(4) The interpretation of a statute should be in accordance with the policy and object of the statute in question. According to Lord Halsbury: "It is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry

into the object of the statute or the mischief which it was intended to remedy." According to Lord Goddard: "A certain amount of commonsense must be applied in construing a statute. The object of the Act has to be considered." According to Channell, J: "It is always necessary in construing a statute and in dealing with the words you find in it to consider the object with which the statute was passed; it enables one to understand the meaning of the words introduced into the enactment." According to Lord Cave: "I base my decision on the whole scope and purpose of the statute and upon the language of the sections to which I have specifically referred."

(5) The words used in a statute should be construed in the popular sense. If those are used in connection with some particular business or trade, they will be presumed to be used in a sense appropriate to or usual in such business or trade. According to Lord Hewart: "It ought to be the rule and we are glad to think that it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred."

(6) The words in a statute should be taken to have been used in the sense that bore at the time the statute was passed. According to Lord Esher: "The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed."

(7) There is a presumption in the construction of statutes that the same words are used in the same meaning in the same statute and a change of language is an indication of change of intention on the part of the legislature. According to Lord Shaw: "In the absence of any context indicating a contrary intention, it may be presumed that the legislature intended to attach the same meaning to the same words when used in a subsequent statute in a similar connection." According to Lord Macmillan: "When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. In tax legislation, it is far from uncommon to find

there may be inaccuracy and inconsistency; you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it." According to Lord Davey: "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter "

(3) The statute should be construed in a manner to carry out the intention of the legislature. According to Lord Blackburn: "I quite agree that in construing an Act of Parliament, we are to see what is the intention which the legislature has expressed by the words, but then the words again are to be understood by looking at the subject-matter they are speaking of and the object of the legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced " According to Lord Radcliffe. "There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention." The fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded "according to the intent of them that made it" According to Lord Simond. "The duty of the court is to interpret the words the legislature has used, those words may be ambiguous. But even if they are, the powers and duty of the court to travel outside them on a voyage of discovery are strictly limited, see for instance, *Assam Railways and Trading Co. v. I. R. C.* and particularly the observations of Lord Wright." It is not the duty of courts to fill up the gaps in a statute. To do so is to usurp the legislative function under the thin disguise of interpretation. If a gap is discovered, it is for the legislature to fill up the same.

(4) The interpretation of a statute should be in accordance with the policy and object of the statute in question. According to Lord Halsbury: "It is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry

into the object of the statute or the mischief which it was intended to remedy." According to Lord Goddard: "A certain amount of commonsense must be applied in construing a statute. The object of the Act has to be considered." According to Channell, J.: "It is always necessary in construing a statute and in dealing with the words you find in it to consider the object with which the statute was passed, it enables one to understand the meaning of the words introduced into the enactment." According to Lord Cave: "I base my decision on the whole scope and purpose of the statute and upon the language of the sections to which I have specifically referred."

(5) The words used in a statute should be construed in the popular sense. If those are used in connection with some particular business or trade, they will be presumed to be used in a sense appropriate to or usual in such business or trade. According to Lord Hewart: "It ought to be the rule and we are glad to think that it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred."

(6) The words in a statute should be taken to have been used in the sense that bore at the time the statute was passed. According to Lord Esher: "The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed."

(7) There is a presumption in the construction of statutes that the same words are used in the same meaning in the same statute and a change of language is an indication of change of intention on the part of the legislature. According to Lord Shaw: "In the absence of any context indicating a contrary intention, it may be presumed that the legislature intended to attach the same meaning to the same words when used in a subsequent statute in a similar connection." According to Lord Macmillan. "When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. In tax legislation, it is far from uncommon to find



amendments introduced at the instance of the Revenue Department to obviate judicial decisions which the department considers to be attended with undesirable results.”

(8) If the language of a statute is clear, it must be enforced although the result may seem harsh or unfair or inconvenient. It is only when there are alternative methods of construction that notions of injustice and inconvenience may be allowed scope. According to Tindal, C. J.: “Where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.” According to Lord Birkenhead: “The consequences of this view will no doubt be extremely inconvenient to many persons. But this is not a matter proper to influence the House unless in a doubtful case affording foothold for balanced speculation as to the probable intention of the legislature.”

(9) As far as possible, statutes should be interpreted in such a way as to avoid absurdity. According to Jervis, C. J.: “If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see an absurdity or manifest injustice from an adherence to their literal meaning.”

(10) The doctrines of *expressio unius exclusio alterius* and *ejusdem generis* apply in the interpretation of statutes. The first doctrine means that the expression of one person or thing implies the exclusion of other persons or things of the same class which are not mentioned. The term “*ejusdem generis*” means “of the same kind”. According to Collick: “It is the general rule of construction that where a broad class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters *ejusdem generis* with such class.” According to Lord Halsbury: “There are two rules of construction now firmly established as part of our law. One is that words, however general, may be limited in respect to

the subject-matter in relation to which they are used. The other is that the general words may be restricted to the same *generis* as the specific words that precede them."

In Byren's *Law Dictionary* the rule of *ejusdem generis* has been explained as follows: "It is a rule of legal construction that general words following enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality."

(11) It is not the business of a court to fill up the gaps in a statute. That is the function of a legislature. According to Lord Wright: "It may be that there is a *casus omissus*, but if so, that omission can only be supplied by a statutory action. The court cannot put into the Act words which are not expressed and which cannot reasonably be implied on any recognised principles of construction. That would be the work of legislation, not of construction, and outside the province of the court." However, courts have occasionally tried to fill up the gaps, although this tendency is not approved of.

(12) The general rule of interpretation is that no law is to have retrospective effect unless a specific intention to that effect is given in the statute itself. Ordinarily, all laws are to be interpreted to have prospective effect only. According to Scrutton, L.J.: "*Prima facie*, an Act deals with future and not with the past events. If this were not so, the Act might annul rights already acquired, while the presumption is against the intention." According to Wright, J.: "Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language that is fairly capable of either interpretation, it ought to be construed as prospective only." According to Lindley, L.J.: "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction and the same rule involves another and subordinate rule to the effect that a statute is not to

be construed so as to have a greater retrospective effect than its language renders necessary."

(13) Nobody has a vested right in procedure. There is no presumption that a change in procedure is *prima facie* intended to be prospective only and not retrospective. According to Blackburn: "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."

(14) While interpreting a statute, certain presumptions have to be taken into consideration by the courts. It is always to be presumed that the legislature does not make mistakes, and if it actually does make a mistake, it is not for a court to correct the same. According to Lord Halsbury: "But I do not think it competent for any court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed on the assumption that the legislature is an ideal person that does not make mistakes." According to Lord Loreburn: "It is quite true that in construing private Acts, the rule is to interpret them strictly against the promoters and liberally in favour of the public, but a court is not at liberty to make laws however strongly it may feel that Parliament has overlooked some necessary provision or even has been over-reached by the promoters of a private bill."

(15) Another presumption is that the legislature knows the practice. According to Hamilton, L.J.: "I think it is a sound inference to be drawn as a matter of construction that the legislature, aware as I take it to have been, of the practice of these inquiries and its incidents, intended that the local inquiry which it prescribed should be the usual local inquiry and that the usual incidents should attach in default of any special enactment, including the incident that the Board would treat the report as confidential."

(16) Another presumption is that the legislature does not intend what is inconvenient or unreasonable. According to Lindley: "Unless Parliament has conferred on the court that power in language which is unmistakable, the court is not to assume that Parliament intended to do that which might seriously affect foreigners who are not resident here and give offence to foreign govern-

ments ” According to Brett, M.R. : “With regard to inconvenience, I think it is a most dangerous doctrine. I agree that if the inconvenience is not only great, but what I may call an absurd inconvenience in reading an enactment in its ordinary sense, whereas if you read it in a manner of which it is capable, though not in its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning. If an enactment is such that by reading it in its ordinary sense, you produce a palpable injustice, whereas by reading it in a sense it can bear, though not in exactly its ordinary sense, it will produce no injustice, then I admit one must assume that the legislature intended that it should be so read as to produce no injustice ”

(17) Another presumption is that the legislature does not intend any alteration in the existing law except what it expressly declares. According to Lord Wright : “The general rule in exposition of all Acts of Parliament is somewhat this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a consideration as may be agreeable to the rules of common law, in cases of that nature ; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare.” According to Devlin, J. : “A statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words which point unmistakably to that conclusion.”

(18) Another presumption is that public or private vested rights are not taken away by the legislature without compensation. According to Bowen, L.J. . “In the consideration of statutes, you must not construe the words so as to take away rights which already exist before the statute was passed, unless you have plain words which indicate that such was not the intention of the legislature.” According to Brett, M.R. : “It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons’ rights without compensation unless one is obliged to so construe it ”

(19) Another presumption is that statutes do not violate the principles of International Law. According to Craies. “The judges may not pronounce an Act *ultra vires* as contravening inter-

national law, but may recoil in case of ambiguity, from a consideration which would involve a breach of the ascertained and accepted rules of international law.”

(20) It is a rule of interpretation well-settled that in construing the scope of a legal fiction it will be proper and even necessary to assume all those facts on which the fiction can operate. A consideration which would defeat the object of the legislation must, if that is possible, be avoided.

(21) The test of pith and substance is generally and more appropriately applied when a dispute arises as to the legislative competence of the legislature, and it has to be resolved by a reference to the entries to which the impugned legislation is relatable. When there is a conflict between two entries in the legislative lists and legislation by reference to one entry would be competent but not by reference to the other, the doctrine of pith and substance is involved for the purpose of determining the true nature and character of the legislation in question. (AIR 1961 SC 232).

(22) While interpreting a taxing statute, equitable considerations are entirely out of place. Likewise, taxing statutes cannot be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed. It cannot imply anything which is not expressed. It cannot import provisions in the statutes so as to supply assumed deficiency. (AIR 1961 SC 1047).

(23) The tendency of the courts towards technicality is to be deprecated. It is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter. They cannot be broken. Others are only directory and a breach of them can be overlooked provided there is a substantial compliance with the rules read as a whole and provided no prejudice ensues. When the legislature does not itself state which is which, judges must determine the matter and exercising a nice discrimination sort out one class from the other along broadbased commonsense lines. (AIR 1956 SC 140).

(24) In determining the constitutionality of a statute, the court is not concerned with the motives of the legislature, and

whatever justification some people may feel in their criticisms of the political wisdom of a particular legislative or executive action, the Supreme Court cannot be called upon to embark upon an enquiry into public policy or investigate into questions of political wisdom or even to pronounce upon motives of the legislature in enacting a law which it is otherwise competent to make. (AIR 1959 SC 860).

(25) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. The right of appeal is not a mere matter of procedure but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceedings and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise. (AIR 1957 SC 540).

(26) In the case of a penal statute, no proceedings under it are generally maintainable in respect of acts done before the commencement of the statute, unless the statute includes such acts by express provision or necessary intendment. The act which was not an offence at the time it was done under the law then prevailing, cannot become so by reason of the operation of some statute which itself came into existence at a subsequent date. All penal statutes have to be construed strictly in favour of the accused.

(27) In *Ex parte Campbell*, James L.J. observed: "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the legislature has repeated them without alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction

has given to them.” The view of Lord Denning is that he does not believe that whenever Parliament re-enacts a statute, it thereby gives statutory authority to every erroneous interpretation which has been put upon it. In *Royal Court Derby Porcelain Ltd. v. Raymond Russell*, Lord Denning observed: “The true view is that that court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms.” [(1949) 2 KB 417, 429].

### SUGGESTED READINGS

- |                  |   |
|------------------|---|
| Allen, C.K.      | : <i>Law in the Making</i> .  |
| Allen, C.K.      | : <i>Law and Orders</i> , 1956.   |
| Bondenheimer, E. | : <i>Jurisprudence</i> , Harvard University Press, 1962.                        |
| Craies, W.F.     | : <i>Statute Law</i> , 1963.  |
| Cross, A R.N.    | : <i>Statutory Interpretation</i> , Butterworth, 1976.                          |
| Dickerson, F.R.  | : <i>The Interpretation and Application of Statutes</i> , Boston, 1975.         |
| Farrar, J.H.     | : <i>Law Reform and the Law Commission</i> , Sweet and Maxwell, 1974.           |
| Gray, J.C.       | : <i>The Nature and Sources of the Law</i> , Macmillan Company, New York, 1921. |
| Kecton, G.W.     | : <i>The Elementary Principles of Jurisprudence</i> , 1949.                     |
| Levi, E.H.       | : <i>An Introduction to Legal Reasoning</i> .                                   |
| Maxwell, P.B.    | : <i>The Introduction of Statutes</i> .   |
| Odgers, C.E.     | : <i>The Construction of Deeds and Statutes</i> , 1956.                         |
| Paton, G.W.      | : <i>A Textbook of Jurisprudence</i> , Oxford, 1972.                            |
| Pound, Roscoe    | : <i>Jurisprudence</i> , 1959.  |
| Ross, A.         | : <i>On Law and Justice</i> , 1958.   |
| Salmond, J.W.    | : <i>Jurisprudence</i> .  |
| Stone, J.        | : <i>Legal System and Lawyers' Reasonings</i> , Stevens and Sons, 1964.         |

# X

## PRECEDENT

### Precedent as Source of Law

Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. According to Salmond: "The great body of the unwritten law is almost entirely the product of outside cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward the First at the close of the 13th century . . . . In practice, if not in theory, the common law of England has been created by the decisions of English judges" The one reason why precedent occupies so high a place in the English system is that English judges have occupied a very high position in the country. They have been experts in their line and consequently their decisions have enjoyed high reputation. The Bench has always given law to the Bar in England.<sup>1</sup>

However, there are some writers who are of the view that judicial precedent is not a source of law. It is merely evidence of customary law. Savigny belongs to this school of thought. To quote Stobbe: "Practice is in itself not a source of law; a court can depart from its formal practice and no court is bound to the practice of another. Departure from the practice hitherto observed is not only permitted but required if there are better reasons for another treatment of the question of law."

Keeton rejects this view and holds that a judicial precedent is a source of law. To quote him: "A judicial precedent is a

1. Bentham paid the following tribute to the case-law in England: "Traverse the whole continent of Europe—ransack all the libraries belonging to the jurisprudential systems of the several political States, add the contents altogether . . . . you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement . . . in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English reports of adjudged cases."



judicial decision to which authority has in some measure been attached. It must be noted at once, however, that partly because of the high status which judges occupy in political and social organization and partly because of the importance of the issues which they decide, judicial decisions have at all times enjoyed high authority as indications of the law." Again, "the English people have always looked to their judiciary as the fount of law and the courts have made their province to ensure that that fount should never run dry. They have regarded the law as a comprehensive whole, capable of indefinite application to special cases and possessing the inherent quality of consistency. It is precisely this quality of consistency which has enabled English people to accept judge-made law without question as a natural element in English law." According to Thibaut: "If in any court a rule has been frequently and constantly followed as law, that court must follow these hitherto adopted rules as law, whether they relate to simple forms or to the substances to controversies, if they do not contradict the statutes, but yet only on the points on which the former judgments agreed. Coordinate courts do not bind each other with judgments but upper courts do bind the lower, so far as an earlier practice has not formed itself in the latter, and one ought not to treat the opinions of jurists as equal to the practice of the courts, although the former may, under certain circumstances, be of importance as authorities."

Blackstone writes: "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment."

According to Cardozo: "In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether, I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to the breaking point if every past

decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. Perhaps the constitution of my own court has tended to accentuate this belief. We have had ten judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not. But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years" (pp 149-51, *The Nature of the Judicial Process*).

### **Nature of Precedent**

A precedent is purely constitutive and in no degree abrogative. This means that a judicial decision can make a law but cannot alter it. Where there is a settled rule of law, it is the duty of the judges to follow the same. They cannot substitute their opinions for the established rule of law. Their function is limited to supplying the vacancies of the legal system, filling up with new law the gaps that exist in the old and supplementing the imperfectly developed body of legal doctrine.

### **Authority of Precedent**

The reason why a precedent is recognised is that a judicial

decision is presumed to be correct. That which is delivered in judgment must be taken for established truth. In all probability, it is true in fact and even if it is not, it is expedient that it should be held to be true. The practice of following precedents creates confidence in the minds of the litigants. Law becomes certain and known and that in itself is a great advantage. It is conducive to social development, administration of justice becomes even-handed and fair. Decisions are given by judges who are experts in the study of law.

According to Jessel, M. R. : "If I find a long course of decisions by inferior courts acquiesced which have become part of the settled law, I do not think it is the province of the appeal court after a long course of time to interfere, because most contracts have been regulated by those decisions. There is another consideration which always has weight with me. When the law is settled, it gets into the text-books which are a very considerable guide to practitioners." Again, "where a series of decisions of inferior courts have put a construction on an Act of Parliament and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decisions and the practice of mankind in conducting their affairs."

According to Lord Loreburn : "I think this case falls within the rule that it is not necessary or advisable to disturb a fixed practice which has been long observed in regard to the disposition of property, even though it may have been disapproved at times by individual judges, where no real point of principle has been violated."

According to Lord Buckmaster : "Firstly, the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered, unless your lordships could say positively that it was wrong and productive of inconvenience. Secondly, decisions upon which the title to property depend or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection. Thirdly, decisions that affect the general conduct of

affairs so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected ought in the same way to continue."

According to Dr. Julius Stone: "Precedent had played and will continue to play a most important part in common law judicial achievement. In the first place, precedents present for the instant case a rapid if incomplete review of social contacts comparable to the present, and of a rule thought suitable for those context by other minds after careful inquiry. In the second place, precedents serve to indicate what kind of result will be reached if a particular premises or category is chosen for application in the instant case, and permit comparison with the results if some other premises or category is adopted, either drawn from other cases, or judicially invented. In *Haseldine v. Daw* the common carrier cases gave the court a ready view of the results for the lift passenger if that analogy were followed, as well as of the context in which courts in the past had regarded such results as just for an injured plaintiff. The case on occupiers of premises afforded another glimpse of other results deemed just in another context. But the court had still to make up its mind that it wished to reach one or other result, or some result, quite different from either, in the context that was actually before it in *Haseldine v. Daw*. "A good judge is one who is the master, not the slave, of the cases." (p. 192, *The Province and Function of Law*).

*Circumstances which destroy or weaken the binding force of precedent*

The operation of precedent is based on the legal presumption that judicial decisions are correct. A matter once decided is decided once for all. What has been delivered in a judgment must be taken to be an established truth. In all probability, it is true in fact. Even if it is not, it is expedient that it should be held as true. However, there are circumstances which destroy or weaken the binding force of a precedent. Those are exceptions to the rule of the binding force of precedent.

(i) *Abrogated Decision*.—A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court. Reversal occurs when the same decision is taken on appeal and is reversed

by the appellate court. Overruling occurs when the higher court declares in another case that the precedent case was wrongly decided and so is not to be followed. As overruling is the act of a superior authority, a case is not overruled merely because there exists some later opposing precedent of the same court or a court of coordinate jurisdiction. In such cases, a court is free to follow either precedent. When a case is overruled in the full sense of the word, the courts become bound by the overruling case. Overruling need not be express, but may be implied. Until the 1940s, the practice of the Court of Appeal was to follow its own previous decision even though it was manifestly inconsistent with a later decision of the House of Lords provided it had not been expressly overruled. Lord Wright, in a case in the House of Lords, questioned the correctness of this attitude and in *Young's* case, the Court of Appeal accepted the new principle that it is not bound by its previous decision if it cannot "stand with" a subsequent decision of the House of Lords.

In India, the Twenty-fourth Amendment of the Constitution of India was passed to nullify the decision of the Supreme Court of India in the case of *Golak Nath*. Likewise, the Twenty-fifth Amendment of the Constitution sought to remedy the situation resulting from the decision of the Supreme Court in the *Bank Nationalisation* case.

(ii) *Affirmation or Reversal on a Different Ground*.—It sometimes happens that a decision is affirmed or reversed on appeal on a different point. Suppose a case is decided in the Court of Appeal on ground *A* and then goes on appeal to the House of Lords which decides it on ground *B*, nothing being said upon *A*. The view of Jessel, M R. is that where the judgment of the lower court is affirmed on different grounds, it is deprived of all authority. Such conduct on the part of the appellate court shows that the appellate court did not agree with the grounds mentioned. Although this is sometimes a correct reading of the state of mind of the higher court, it is not so always. The higher court may shift the ground of its decision because it thinks that this is the easiest way to decide the case. It is possible to find cases where judgments affirmed on a different point have been regarded as authoritative for what they decided. It is the same with cases reversed on another point.

The true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force which it might otherwise have had, but it remains an authority which may be followed by a court that thinks the particular point to have been rightly decided.

(iii) *Ignorance of Statute*.—A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of a statute, i e., delegated legislation. Similarly, a court may know of the existence of the statute or rule and yet not appreciate its relevance to the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.

(iv) *Inconsistency with Earlier Decisions of Higher Court*—A precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court. For example, if the Court of Appeal decides a case in ignorance of a decision of the House of Lords which went the other way, the decision of the Court of Appeal is *per incuriam* and is not binding either on itself or on lower courts. On the contrary, it is the decision of the House of Lords that is binding. Thus, if the High Court of Delhi decides a case in ignorance of a decision of the Supreme Court of India, the decision of the High Court of Delhi is not a precedent and hence is not binding on any lower court. Such a decision is said to be *per incuriam*.

(v) *Inconsistency Between Earlier Decisions of the Same Rank*.—A court is not bound by its own previous decisions that are in conflict with one another. The court of appeal and other courts are free to choose between conflicting decisions, even though this might amount to preferring an earlier decision to a later decision, preferring an unreported decision to a reported decision and preferring a decision of a court of coordinate jurisdiction to its own decision.

Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them. The lower court may refuse to follow the later decision on the ground that it was arrived at *per incuriam*, or it may follow such decision on the ground that it is the latest decision. Which of these two courses the court adopts depends upon its own view what the law ought to be.

(vi) *Precedents sub silentio or not Fully Argued*.—When a particular point involved in a decision is not taken notice of and is not argued by a counsel, the court may decide in favour of one party, whereas if all the points had been put forth, the decision may have been in favour of the other party. Hence such a rule is not an authority on the point which had not been argued and this point is said to pass *sub silentio*. This rule can be traced in English law to 1661 when in a famous English case, the counsel said, “a hundred precedents *sub silentio* are not material,” and the judge agreed.

A good illustration of a precedent *sub silentio* given by Salmond is that of a case where an employee was discharged by a company and he obtained damages against the company for wrongful dismissal. The employee applied for a garnishee order in respect of a bank account standing in the name of the liquidator of the company. The only point argued in the court of appeal was on the question of the priority of the employee's claim and the order was granted. No consideration was given to the question whether a garnishee order could properly be made in such a case. The latter point came up for decision in a subsequent case before the same court and the court held that it was not bound by its previous decision.

It is stated in the latest edition of Salmond that a precedent is not destroyed merely because it was badly argued, inadequately considered and fallaciously reasoned. A rather arbitrary line has to be drawn between total absence of argument on a particular point which vitiates the precedent and inadequate argument which is a ground for impugning the precedent only if it is absolutely binding and indistinguishable.

In *K. Balkrishna Rao v. Haji Abdulla Sait*, the Supreme Court observed that the binding force of a precedent does not depend on whether a particular argument was considered therein or not, provided the point with reference to which an argument was subsequently advanced was actually decided by the Supreme Court. [(1980) 1 SCC 321].

(vii) *Decisions of Equally Divided Courts*.—Where an appellate court is equally divided, the practice is to dismiss the appeal. The rule adopted in the House of Lords is that the decision appealed

from becomes the decision of the House of Lords. This problem is not a serious one today as it is the usual practice of most appellate courts to sit with an uneven number of judges like three or five.

(viii) *Erroneous Decisions*.—Decisions may also err by being founded on wrong principles or by conflicting with fundamental principles of common law. Logic suggests that court should be free to disregard those decisions, but practical considerations may require that perfection may be sacrificed to certainty. Where the decision has stood for some length of time and has been regarded as established in the law, the people must have acted while relying on it and dealt with the property and made contracts on the strength of it and in general made it a basis of expectations and a ground of mutual dealings. In such circumstances, it is better that the decision, though founded in error, should stand. However, courts may overrule erroneous decisions of long standing which involve injustice to the citizen or which concern an area of law such as taxation where it is important for the citizen that the courts should establish what the correct law is.

The rule that courts are bound by decisions of higher courts and in some cases by their own decisions, even though wrong, must stand as authority until overruled by a higher authority. On this principle, an erroneous decision of the House of Lords can only be corrected by statute. However, in *London Transport Executive v. Betts*, Lord Danning expressed the view that the House of Lords could disregard a prior decision of its own which conflicted with fundamental principles of common law (1959 AC 213). In *Scruttons Ltd. v. Midland Silicones Ltd.* (1962 AC 446), the House of Lords by a majority of four to one disregarded their own previous decision in *Elder, Dempster and Company v. Paterson Zochonis and Company* (1924 AC 522).

The Supreme Court of India has also differed from its previous decisions in many cases. In *Bengal Immunity Co. Ltd. v. State of Bihar*, the Supreme Court held that there is nothing in our Constitution which prevents the Supreme Court from departing from a previous decision if it is convinced of its error and its baneful effect on the general interests of the public. However, the Supreme Court should not lightly dissent from a previous



pronouncement of the court. Its power of review must be exercised with due care and caution and wholly for advancing the public well-being in the light of the surrounding circumstances of each case brought to its notice but it is not right to confine its power within rigidly fixed limits. If on a re-examination of the question, the Supreme Court comes to the conclusion that the previous majority decision was plainly erroneous, it will be its duty to say so and not to perpetuate its mistake even when one learned judge who was a party to the previous decision, considers it incorrect on further reflection. It should do so all the more readily when its decision is on a constitutional question and its erroneous decision has imposed illegal tax burden on the consuming public and has otherwise given rise to public inconvenience or hardship. (AIR 1955 SC 661).

#### *Circumstances which increase the authority of a precedent*

There are circumstances which tend to increase the authority of a precedent. The number of judges constituting the Bench and their eminence is a very important factor in increasing the authority of a precedent. To some extent, the eminence of the lawyers who argued the case enhances the authority of a precedent. A unanimous decision carries more weight. Affirmation, approval or following by other courts, especially by a higher tribunal adds to the strength of a precedent. If an Act is passed embodying the law in a precedent, the precedent gains an added authority. To a limited extent, the lapse of time adds to the authority of a decision. Likewise, if a precedent is not followed for a long time, its authority starts deteriorating.

#### *Do Judges Make Law?*

There are two contrary views on this point. The first view is that judges only declare the existing law. The second view is that they make law.

*Declaratory Theory* —The Declaratory Theory is concerned with the first view. According to this theory, judges are no more than the discoverers of law. They discover the law on a particular point and declare it. This view has been supported by many writers, jurists and judges.

The view of Chief Justice Coke is that judicial decisions are not a source of law but the best proof of what the law is.

Sir Mathew Hale wrote in 1713: "The decisions of courts of justice do not make a law properly s<sup>o</sup> called, for that only King and Parliament can do; yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is . . . And though such decisions are less than a law, yet they are greater evidence thereof than the opinion of any private persons, as such, whatsoever."

Blackstone wrote: "They (judges) are the depositories of the laws; the living oracles who must decide in all cases of doubt and who are bound by an oath to decide according to the law of the land. These judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. . . . A judge is sworn to *determine*, not according to his private judgment but according to the known laws and customs of the land; not delegated to pronounce a new law but to maintain and explain the old one."

Lord Esher says in *Willis v. Baddeley*: "There is in fact no such thing as judge-made law, for the judges do not make the law though they frequently have to apply the existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."

Blackstone's view has been supported by Dr. James Carter. According to him, all judicial decisions merely declare the existing law. If no law existed and a judge decided a case before him, he was guilty of an indefensible outrage. However, if law did exist, then the judge did not create it. To quote Carter: "If what the judges did was to declare a law not existing before, the subjection by them of one of the parties to liability for an infraction of the law in a transaction occurring before the existence of law would be an indefensible outrage. Anyone who undertakes to support Austin's theory encounters here an ugly dilemma; the law by which the judge makes a decision either existed at the time of the transaction involved in the case, or it did not, and was made by the judge; if it did exist, the judge did not make it—if it did not exist at the time of the transaction, then what the judge has done and the sovereign ratified is to compel a man to suffer for the violation of a law committed before the law was

made. No theory of law can stand which involves such a consequence.” (*Law, Its Origin, Growth and Function*, p. 185).

Many other judges have voiced the same view. In *Hernett v. Fisher*, Scrutton, L. J. said: “This court sits to administer the law; not to make new law if there are cases not provided for.”

According to Dr. Allen: “A man who chops a tree into logs has in a sense made the logs.” The same applies to the judges who are the discoverers and not the creators of law.

In *Rajeshwar Prasad v. State of West Bengal*, Justice Hidayatullah observed: “No doubt, the law declared by this court (Supreme Court of India) binds courts in India, but it should always be remembered that this court does not enact.” (AIR 1965 SC 1887).

The declaratory theory has been criticised by Bentham as “a wilful falsehood having for its object the stealing of legislative power by and for hands which could not or durst not, openly claim it.” His disciple John Austin called this theory as “the childish *fiction* employed by judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges.”

Munroe Smith writes that the declaratory theory cannot be taken seriously. To quote him: “The fact that English common law has never had any existence except in decisions; that by decisions it has been developed in historical times from scanty beginnings into a great and complex system; that by decisions its rules have continually been modified and frequently overruled, these facts have been more cogent to the average mind than any official theory.”

Salmond writes: “Both at law and in equity, however, the declaratory theory must be totally rejected if we are to attain to any sound analysis and explanation of the true operation of judicial decisions. We must admit openly that precedents make law as well as declare it. We must admit further that this effect is not merely accidental and indirect, the result of judicial error in the interpretation and authoritative declaration of the law. Doubtless, judges have many times altered the law while endea-

vouring in good faith to declare it. But we must recognise a distinct law-creating power vested in them and openly and lawfully exercised. Original precedents are the outcome of the intentional exercise by the courts of their privilege of developing the law at the same time they administer it."

Blackstone's theory that judges can make no new law but merely declare it, is only a *fiction*. In its origin perhaps, this fiction served a useful purpose. An open profession by judges that they made new law, might have made them unpopular. Unsuccessful litigants might submit with resignation to what is declared to have been the law of the land, but they would have rebelled against a decision avowedly applying new law. The judges, being naturally conservative, seem to have adopted this fiction in order to guard against unwise innovations and to preserve the element of certainty in law. Such perhaps were the reasons why this fiction was originally adopted but an explanation of its origin is not its justification. If we want to have a sound theory of the nature of judiciary law and the true operation of precedents, it is necessary to reject the fiction that the duty of the judge is only to expound the pre-existing law.

Critics also point out that in the field of equity, judges have not only been active in modifying, rationalising and explaining common law rules but also in creating new laws at times. It is forgotten by the advocates of the declaratory theory that judges not only interpret the existing law but also expound new propositions of law.

*Judges as Law-makers* —The other view is that judges make laws. A number of jurists have supported this view. Lord Bacon said that the points which the judges decide in cases of first impression is a "distinct contribution to the existing law".

In his book *Law and Opinion in England*, Dicey writes. "As all lawyers are aware, a large part and as many would add, the best part of the law of England is judge-made law—that is to say, consists of rules to be collected from the judgments of the courts. This portion of the law has not been created by Act of Parliament and is not recorded in the statute book. It is the work of the courts; it is recorded in the reports; it is, in short, the fruit of legislation" (p 361).

Prof. Gray goes to the extent of saying that judges alone are the makers of law. He supports the following proposition of Bishop Hoadly: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes and not the person who first wrote or spoke them." Proof. Gray gives his own view in these words: "*A fortiori*, whoever hath an absolute authority not only to interpret the law, but to say what the law is, is truly the law-giver." (*Nature and Sources of the Law*, p. 122).

Sir Frederick Pollock, the distinguished English jurist, wrote: "No intelligent lawyer would at this day pretend that the decisions of the courts do not add to and alter law. The courts themselves, in the course of the reasons given for those decisions constantly and freely use language admitting that they do "

Speaking on the role of the judges, President Roosevelt in his message of 8 December, 1908 to the Congress of the United States, said: "The chief law-makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process or law, liberty, they necessarily enact into law parts of the system of social philosophy; and as such interpretation is fundamental, they give direction to all law making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century, we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy which was itself the product of primitive economic conditions."

Critics point out certain limitations on the legislative powers of the judges. A judge cannot overrule a statute. Where a statute has clearly laid down the law, the judge has to enforce it. He has to leave it to the legislator to deal with any unpleasant consequences not foreseen when the law was made. Authoritative precedents also limit the law-making power of the judge as he cannot depart from them. The legislative power of the judge is restricted to the facts of the case before him. Any ruling which he may lay down will be law only in so far as it is necessary for the decision of the case. Any principles laid down by a judge

which do not form the ground of his decision and which are not applicable to the case under consideration are only *obiter dicta*. Such *dicta* have no binding authority. In *Quinn v. Leathem*, Lord Halsbury observed: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that law is not always logical at all." The judge is confined to the facts of the case while enunciating legal principles. Within those limits alone it can be said that judges make law.

Prof. Allen writes: "The judge cannot, however much he may wish to do so, sweep away the prevailing rule of law and substitute something else in its place. In this sense it is no childish fiction to say that he does not and cannot make law. The legislature, on the other hand, has an entirely different prerogative. It is not confined to law in the present or the past, but may do as it wills with the future. It can make new law in a sense which is quite precluded to the judge. It legislates where the judge interprets. The legislature can at any time project into the future a rule of law which has never existed in England; the courts can do nothing of this kind." (*Law in the Making*, p. 174).

According to Justice Holmes: "I recognise without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say, I think, the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

The view of Justice Cardozo is that "the judge, even though he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience

is the field of discretion that remains.” (*The Nature of the Judicial Process*, p. 141). Again, “it is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator’s mind.” (*Ibid.*, pp. 14-15) Again, “the work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built.” (*Ibid.*, p. 178).

*Conclusion.*—It is submitted that both the above views regarding the function of judges contain only a partial truth. Whether judges make or declare law depends on the nature of the particular legal system. In common law countries, the role of the judges has been greatly creative. In countries where the law has been codified, the role of the judges has been comparatively less creative. However, the difference between the two is not very great.

The two views regarding the role of the judges are rather complementary and not opposed to each other. A true picture of the judicial function lies in the synthesis of the two views. The creative role of the judges in England has been so dominant that English law is sometimes referred to as judge-made law, but this does not mean that judges in England have made the law in the same sense in which legislatures make it. Moreover, this view does not apply to other countries. A judge may be said to be laying down law in cases of first impression, but while doing so he is guided by certain principles, conventions and ideals. Even in countries where law is codified, a judge gives creative touches while applying the codified law. The result is that judges not only declare law but also make law. However, the words make and declare should not be taken in their common meaning but in a special sense.

The conclusion is that really speaking, there is not much difference

rence between declaring and making Though these words are not synonyms, the difference is only that of degree. Declaring does not mean something mechanical. It also involves a creative and intelligent process by which the rules are applied to particular cases. Likewise, making does not mean that judge make law in the sense in which legislators make law. A judge merely works upon the material given to him by the legislature. His function is interpretation only and while doing so, he plays a creative role. He gives life to the skeleton of law. He adapts it to the changed conditions and causes its dynamic growth.

Even if judges do not make law in the sense of promulgating it, it must be acknowledged that they develop the law. The personal stamp of the great judge is upon every legal system. It cannot be denied that the personality of Papinian and Tribonian has entered into the Roman law. The stamp of Coke and Mansfield is indelibly imprinted on English law. Chief Justice Marshall was undoubtedly the creator of much that has stood the test of time in the American Constitution. Justice Muthuswami Ayyar stands out as personally responsible for things of the first moment in Indian law By removing ambiguities, clarifying obscurities and harmonising antinomies, the judges impart certainty to the legal system.

The law-making function of the judges has taken a new turn in the twentieth century. The sociological approach emphasizes the creative role of the judges in society. During recent times, some political systems left enough powers in the hands of the judges to make laws. During the regime of Hitler, judges in Germany gave a political interpretation to law and twisted it to further the aims of the Nazi rulers. The Jews of Germany were suppressed and executed under the orders of the courts However, such a function cannot be called creative.

An important place is given to the judiciary both in a democratic set-up and a totalitarian set-up. In a democratic set-up, courts help the establishment of democratic values. In a totalitarian State, the judiciary is used to support the political ideology of the State. Article 1 of the Soviet Criminal Code, 1926 lays down that the object of the Code is to protect the socialist State of workers and peasants and the legal order established by it.



Article 2 provides that no judge may let acts included within the terms of Article 1 go unpunished simply because such acts are not defined or forbidden by law or because of obscurities or contradictions in the laws.

### Methods of Judicial Decisions

There are two methods of judicial decisions: deductive and inductive. In the case of deductive method, the general legal rule is already fixed and certain and the same is applied in individual cases by the judges. The latter are not required to use their own brains. Their function is merely to apply the law which is already clearly laid down in the same way as a student of geometry uses the axioms. In the case of inductive method, the judge has to start from a particular case and come to a general principle of law. The process is from the particular to the general. According to Allen: "In the one theory, antecedent decisions are helpful only as the illustrations of a general proposition; in the other, they are the very soil from which the general propositions must be mined."

### Defects in Judicial Legislation

There are certain defects in judicial legislation or precedent. In the first place, the decisions of the judges are not intelligible to the common man. Those are to be found in the law reports which are not accessible to the man in that street. It is not possible for an ordinary individual to understand them and draw correct conclusions from them. Very often it is difficult to find out the *ratio decidendi* in a case. That requires a very high training of the mind. Although the people are bound by them and are liable to be punished if they disobey them, they, as a matter of fact, are not in a position to understand them without the help of competent lawyers.

Another defect of judicial precedents is that they create an atmosphere of uncertainty. Judges make law only when certain cases are brought before them and not otherwise. Moreover, a decision by one court may be reversed by another court. The result is that so long as a decision is not given by the highest court of the country, the law on the point is not settled and the atmosphere of uncertainty continues.

Natural justice demands that the law should be known before it is enforced. In the case of judicial legislation, what happens is that a case is brought before a court of law and then the decision is given by a judge. It is only when a decision is given that the law is laid down. It is obvious that when the act was actually done, the law had not been laid down. No wonder the critics criticise the retrospectivity of operation of judicial legislation.

The view of Bentham was that these defects could be removed by means of the codification of law. Very many uncertainties of law could be removed by codifying law on a particular point. This could be done at regular intervals. However, during those intervals new precedents may be set up and thus create uncertainty. The view of Amos is that codification should be done after every 10 years. This may be a very good suggestion, but it is not certain how far the same can be actually adopted in practice. The labour and expenditure involved may be too much and no government may undertake such a thankless task.

## **Kinds of Precedents**

### *(1) Authoritative and Persuasive*

According to Salmond, an authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. Authoritative precedents are the legal sources of law and persuasive precedents are merely historical. Authoritative precedents establish law in pursuance of definite rule of law which confers upon them that effect. If persuasive precedents succeed in establishing law at all, they do so indirectly by serving as the historical ground of some later authoritative precedent. They do not have any legal force or effect in themselves. The authoritative precedents must be followed by the judges whether they approve of them or not. The persuasive precedents can merely persuade the judge but it is up to the judge to follow them or not.

The authoritative precedents in England are the decisions of the superior courts of justice. Examples of persuasive precedents

are the foreign judgments, especially those of American courts, Canadian courts, Australian courts, Irish courts, etc., the decisions of superior courts in other parts of the British Empire, the judgments of the Privy Council and the judicial dicta. To quote the Court of Appeal. "We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect and rejoice if we quite agree with it"

In *Attorney General v Dean and Canons of Windsor*, Lord Campbell observed "Observations made by members of the House . . . beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in so far as they may be considered agreeable to sound reason and to prior authorities"

## (2) *Absolute and Conditional Precedents*

Authoritative precedents are of two kinds, absolute and conditional. In the case of absolutely authoritative precedents, they have to be followed by the judges even if they do not approve of them. They are entitled to implicit obedience. In the case of authoritative precedents having a conditional authority, the courts can disregard them under certain circumstances. Ordinarily, they are binding but under special circumstances, they can be disregarded. The court is entitled to do so if the decision is a wrong one. The decision must be contrary to law and reason. It is contrary to law when there is already in existence an established rule of law on the point and the decision does not follow it. When a law on a point is already settled, the only duty of the judge is to declare it and apply it. However, when the law is not settled, the judge can make law for the occasion. But while doing so, it is his duty to follow reason. Unreasonableness is one of the vices of a precedent. While overruling conditional authoritative precedents, the courts must not run the risk of making the law uncertain. Certainty of law is as important as justice itself. According to Lord Eton: "It is better that the law should be certain than that every judge speculate upon importance of it."

A conditional precedent can be disregarded either by dissenting or by overruling. In the case of overruling, the precedent

overruled is authoritatively pronounced to be wrong so that it cannot be followed by courts in the future. In this connection, Warrington, L. J. observes: "The conclusion I draw is that in order that a case may be treated as overruled one must find either a decision of a superior court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that court as a whole that such case was wrongly decided on its own facts and not merely that it ought not to be treated as an authority in a case arising out of different facts." By dissenting, a court declines to follow the precedent and lays down the law in a different sense. The conflict thus created can be resolved only by a superior tribunal when an occasion arises. Till that is done, the law remains in a state of uncertainty. In India, the decision of a single judge of a High Court is only conditionally authoritative and may be dissented from by another single judge or it may be overruled by a division bench. If one division bench dissents from another division bench, the procedure to be adopted is as follows: "While a judge of a High Court sitting alone is not bound on a question of law by the decision of another judge sitting alone, this principle goes on further. The division bench is the final court of appeal in an Indian High Court unless the case is referred to a full bench, and one division bench should regard itself bound by the decision of another division bench on a question of law. In England where there is the Court of Appeal, the divisional courts follow the decisions of other divisional courts on the ground of judicial comity. If a division bench does not accept as correct the decision on a question of law of another division bench, the only right and proper course to adopt is to refer the matter to a full bench for which the rules of this court provide. If this course is not adopted the courts subordinate to the court are left without guidance." [*Seshamma v. Venkata Narasimha Rao*, (1940) 1 MLJ 400 (FB)].

A question has been raised whether the decision of a full bench of the High Court can be overruled by another full bench consisting of a larger number of judges. In the case of *Ningappa v. Emperor*, (1941) Bom 408, Chief Justice Beaumont expressed the view that the decision of a full bench, until it is overruled by the Privy Council, is absolutely authoritative. To quote him: "There can be no doubt that a full bench can overrule a division bench

and that a full bench must consist of three or more judges ; but it would seem anomalous to hold that a later full bench can overrule an earlier full bench merely because the later bench consists of more judges than the earlier. If that were the rule, it would mean that a bench of seven judges, by a majority of four to three, could overrule a unanimous decision of a bench of six judges though all the judges were of coordinate jurisdiction." However, the Madras High Court has taken the view that even a full bench may be overruled by a numerically stronger full bench. In *Raja of Mandasa v. Jagammaykula*, AIR 1932 Mad 612, Wallace, J observed : "The rules on the appellate side permit a division bench to refer any matter to a full bench and there are precedents for a division bench referring the decision of a full bench for consideration to a larger bench." The proper procedure to be adopted is "to refer the matter to the Chief Justice and it is then for him to consider whether the question should be reconsidered by a larger bench".

The view of Blackstone is that precedents must be followed unless they are absurd or unjust. If a precedent is erroneous, it can be disregarded. The maxim of the law is *cessante ratione legis cessat lex ipsa* which means that when the reason for any particular law ceases so does the law itself. A precedent can also be disregarded in the interest of justice.

A court of superior jurisdiction can overrule the decision of a subordinate court. A court of coordinate jurisdiction can simply dissent from another court. This means that the coordinate court can refuse to follow the precedent of another court and also lay down a different rule on the same point. The conflict between the two coordinate courts can be resolved only by a superior court. In the case of India, the decision of a single judge of a High Court is only a conditionally authoritative precedent. Another judge of the same High Court can differ from him. A division bench of the same High Court can overrule the same. There is a difference of opinion on the point whether a full bench of one High Court can overrule the decision of the full bench of another High Court. According to Beaumont, the decision of one full bench is as good as that of another as both of them possess coordinate authority. The numerical superiority of a

full bench does not entitle it to overrule the decision of another full bench. It is only the superior court that can overrule a decision of the full bench. Formerly that was the Privy Council and now it is the Supreme Court of India. According to the Madras High Court, a numerically stronger full bench can overrule the decision of a similar full bench.

The decisions of the House of Lords are absolutely binding on all the courts in England. Even the House of Lords itself is bound by its own decisions. The Court of Appeal is bound by its own decisions or by those of coordinate jurisdiction. There are *three exceptions* to this rule. If there are two conflicting decisions of a court, it must decide which of the two it should follow. If a decision of a court is in conflict with a decision of the House of Lords, it must refuse to follow it even if it is not expressly overruled by a decision of the House of Lords. The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.

In the case of India, an inferior court is bound by the decisions of a superior court. A single judge of a High Court is bound by the decisions of a bench of two or more judges. A decision of the full bench of the same court is binding on a bench consisting of two or more judges. Formerly, the decisions of the Privy Council and Federal Court were binding on all the courts in India. Now, the decisions of the Supreme Court of India are binding on all the courts in India.

In *K. G. Nambiar v. State of Madras*, AIR 1958 Mad 351, Chief Justice Subba Rao observed: "A single judge is bound by a decision of a division bench exercising appellate jurisdiction. If there is a conflict of bench decisions, he should refer the case to a bench of two judges who may refer it to a full bench. A single judge cannot differ from a division bench unless a full bench or the Supreme Court has overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a bench decision on the ground that some observations of Supreme Court made in a different context might indicate a different line of reasoning. A division bench must ordinarily respect another division bench of coordinate jurisdiction; but if it differs, the case should be referred to a full bench."

### (3) *Declaratory and Original Precedents*

According to Salmond, a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule. In the case of a declaratory precedent, the rule is applied because it is already law. In the case of an original precedent, it is law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same. An original precedent is an authority and source of new law but both original and declaratory precedents have their own value.

### **Stare Decisis**

To begin with, there was no doctrine of *stare decisis* as there was no reporting of the decisions of the courts. It was in the 17th century that the decisions of the Exchequer Courts came to be reported in England and were given a binding force. In 1833, the famous decision of Chief Justice Park in *Mirchouse v. Rennel* reiterated the urgent need for recognising the binding force of precedents. Then came the Supreme Court of Judicature Acts of 1873 and 1875 and the theory of *stare decisis* was firmly established. Today it is a characteristic feature of the legal systems of England and India.

The doctrine of *stare decisis* has been recognised by the Constitution of India. Article 141 provides that the law declared by the Supreme Court of India shall be binding on all courts in India. Although the expression "all courts" is wide enough to cover the Supreme Court of India itself, it has been held in *Bengal Immunity Co. Ltd. v. State of Bihar* that the expression does not include the Supreme Court of India (AIR 1955 SC 661). The result is that like the House of Lords, the Supreme Court is free to depart from its previous decisions if valid reasons exist for doing so.

In *Minerva Mills Ltd. v. Union of India*, the Supreme Court

observed : "Certainty and continuity are essential ingredients of the rule of law. Certainty in the application of law would be considerably eroded and suffer a serious setback if the highest court in the land were readily to overrule the view expressed by it in the field for a number of years. . . It would create uncertainty, instability and confusion if the law propounded by this court on the faith of which numerous cases have been decided and many transactions have taken place is held to be not the correct law after a number of years." [(1980) 3 SCC 625].

In *Mahadeolal v Administrator-General of West Bengal*, the Supreme Court held that judges of coordinate jurisdiction should not set aside one another's judgments, for judicial decorum no less than judicial propriety, forms the basis of judicial procedure and certainty in law is not only desirable but also essential. When a single judge of a High Court is of the opinion that the previous decision of another single judge of the same High Court on a point of law is erroneous, he should refer the matter to a larger bench and should not himself hold that the previous decision is wrong. This rule applies not only to judges sitting singly but also to divisional benches. One division bench should not set aside the decision of another division bench of the same High Court.

In *Sheshamma v. Venkata Rao*, the Madras High Court held that a division bench is the final court of appeal in a High Court in India. If a division bench does not accept as correct the decision, on a question of law, of another division bench of that court, the only proper course is to refer the matter to a full bench. (1940 Mad LJ 400).

A similar view was taken by the Andhra Pradesh High Court in *Yedlapati Venkateswarlu v. State of Andhra Pradesh*. It was held that if one division bench of a High Court has expressed a view and another division bench is not inclined to agree with it, the latter cannot, by itself, express a contrary view, but must refer the matter to a full bench. (AIR 1978 AP 333).

Under the *stare decisis* rule, a principle of the law which has become settled by a series of decisions is generally binding on the courts and should be followed in similar cases. This rule is



based on expediency and public policy. Although this rule is generally followed by the courts, it is not applicable in all cases. The reason is that previous decisions should not be allowed to perpetuate a wrong if the court is convinced that the previous decision is wrong. The rule of *stare decisis* is not so imperative or inflexible that it cannot be departed from but its application must be determined in each case by the discretion of the court and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result.

In *Maktul v. Manbhari*, it was held that where the correctness of the decision has been challenged from time to time and in fact had been reversed and its decision has been considerably impaired by a Privy Council decision, the doctrine of *stare decisis* is not applicable. (AIR 1958 SC 918)

A similar view was taken by the Supreme Court of India in *Bachan Singh v. State of Punjab* [(1982) 3 SCC 24]. It was urged before the Supreme Court that the question of constitutional validity of death sentence stood concluded against the petitioners by the decision of a Constitution Bench of 5 judges of the Supreme Court in *Jagmohan Singh v. State of U.P.* (AIR 1973 SC 947) and could not therefore be allowed to be reagitated before a bench consisting of the same number of judges. The plea was rejected by the Supreme Court. It was pointed out that the rule of *stare decisis*, though a 'necessary tool in what Maitland called "the legal smithy"', is only a useful servant and cannot be allowed to turn into a tyrannous master. Reliance was placed on the following observation of Brandeis, J. in *State of Washington v. Dawson and Co.*: "*Stare decisis* is ordinarily a wise rule of action. But it is not a universal and inexorable command." If the rule of *stare decisis* was followed blindly and mechanically, it would dwarf and stultify the growth of law and affect its capacity to adjust itself to the changing needs of society. Cardozo, J. observed thus in his New York State Bar address: "That was very well for a time, but now at last the precedents have turned upon us and are engulfing and annihilating us—engulfing and annihilating the very devotees that worshipped at their shrine."

The Supreme Court emphasised the necessity of ridding

*stare decisis* of something of its petrifying rigidity and warned with Cardozo, J. that "in many instances the principles and rules and concepts of our own creation are merely aperçus and glimpses of reality" and "the need of reformulating them or at times abandoning them altogether when they stand condemned as mischievous in the social consciousness of the hour, the social consciousness which it is our business as judges to interpret as best as we can."

The Supreme Court pointed out that in the present case there were supervening circumstances which justified a reconsideration of the decision in the case of *Jagmohan Singh*. One circumstance was the introduction of the new Code of Criminal Procedure in 1973 by which Section 354(3) made life sentence the rule in case of offences punishable with death or in the alternative imprisonment for life and provided for imposition of sentence of death only in exceptional cases for special reasons. Another supervening circumstance was the decision of the Supreme Court in *Maneka Gandhi v Union of India* [AIR 1978 SC 597: (1978) 1 SCC 248] which gave a new interpretation to Articles 21 and 14 of the Constitution of India. The new dimension of Articles 21 and 14 rendered death penalty provided in Section 302 of the Indian Penal Code read with Section 354(3) of the Code of Criminal Procedure, 1973, vulnerable to an attack on a ground which was not available at the time when the case of *Jagmohan Singh* was decided in 1973. Moreover, since the case of *Jagmohan Singh* was decided, India had ratified two international instruments of human rights and particularly the International Covenant on Civil and Political Rights. Under those circumstances, the Supreme Court did not follow the principle of *stare decisis*.

### Decisions reached per incuriam

A decision given *per incuriam* is a case in which a statute or rule having statutory effect is not brought to the attention of the court. Lord Halsbury mentioned a case decided by the House of Lords in ignorance of a statute as one which would not be binding on the House. Lord Greene gave a judgment in the Court of Appeal in *Lancaster Motor Co. (London) Ltd. v. Bremith* in which a previous judgment of the court was ignored because it contravened the terms of a rule of the Supreme Court. Lord Greene characterized that judgment as one "delivered without argument and delivered

without reference to the crucial words of the rule and without any citation of authority''. It has since been doubted whether a decision on the interpretation of a statute given without reference to a well-recognized general rule of statutory construction can be said to have been given *per incuriam*. The most important development under this head has been the clear recognition of the fact that a decision given in ignorance of a case which would have been binding on the court is given *per incuriam*. The following is the leading statement of the principle in *Morrelle Ltd. v. Wakeling* by Lord Evershed, M. R. : "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some feature of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam*, must, in our judgment, consistently with the *stare decisis* rule which is an essential part of our law, be of the rarest occurrence." The principle appears to be that a decision can only be said to have been given *per incuriam* if it is possible to find a step in the reasoning and show that it was faulty because of a failure to mention a statute, a rule having statutory effect or an authoritative case which might have made the decision different from what it was. A failure to cite authority which would not bind the court is presumably insufficient to render a decision once given *per incuriam*. Such a decision would only be overruled when the later court is satisfied that the earlier court would have decided the case differently had it been made aware of the relevant material.

### Decisions *sub silentio*

In some cases the court may make no pronouncement on a point with regard to which there was no argument and yet the decision of the case as a whole assumes a decision with regard to the particular point. Such decisions are said to pass *sub silentio* and they do not constitute a precedent.

As regards exceptions to the doctrine of *stare decisis*,

Prof. Rupert Cross writes that even if a court would be bound by a particular decision in the ordinary way, that decision need not be followed if the court is House of Lords, if it conflicts with a previous decision of the same court, if it has been impliedly overruled by the subsequent decision of a higher court, if it was reached *per incuriam*, if the court is the Court of Appeal and the previous decision was made on an interlocutory appeal, if perhaps it conflicts with a previous decision of a higher court, notwithstanding the fact that that decision was considered by the court which decided the case in question, which case accordingly cannot be said to have been decided *per incuriam*, if perhaps the previous decision is obsolete, if the previous decision is obscure, out of accord with authority or established principle, or too broadly stated, in these cases the decision but not the *ratio decidendi* is binding, if perhaps the previous case has two *rationes decidendi* in which case a choice may be made between them and if perhaps the result of the case has been reversed by statute, its *ratio decidendi* need not be followed

### Doctrine of Prospective Overruling

In the case of *Golak Nath* (AIR 1967 SC 1643), the Supreme Court of India adopted the Doctrine of Prospective Overruling. In that case, the validity of the First, Fourth and Seventeenth Amendments of the Indian Constitution was challenged and it was contended that those were invalid. Prior to that case, the Supreme Court had held in the cases of *Shankari Prasad* and *Sajjan Singh* that those amendments were valid. The earlier decisions enabled the government to put an end to the Zamindari system and distribute land among the peasants. In the case of *Golak Nath*, the Supreme Court held by a majority of 6 to 5 that the abovementioned amendments were invalid as they prejudicially affected the fundamental right to property. Ordinarily, this would have upset everything done so far in the agrarian field and would have created many complications. The result was that the Supreme Court restricted the effect of its decision to future cases. It was laid down that the fundamental rights could not be taken away or abridged by constitutional amendment in future but whatever had already been done under the First, Fourth and Seventeenth Amendments was not to be disturbed. This is called the Doctrine of Prospective Overruling.

## Ratio Decidendi

According to Salmond: "A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large."

Rupert Cross says that a *ratio decidendi* is a rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion. (*Precedent in English Law*, p 86).

Writers on jurisprudence have advanced different tests for ascertaining the *ratio decidendi*. Professor Wambaugh suggests that the *ratio decidendi* can be discovered by reversing the proposition of law put forward by the court and inquiring whether the decision would be the same notwithstanding the reversal. If it is the same, then the proposition of law is no part of the ratio. Lord Simonds has pointed out defects in the suggestion. In cases where a judge has given two alternative grounds for a decision, the test of Professor Wambaugh would compel us to deny the case any *ratio decidendi* because whichever proposition was reversed the decision would still stand on the other.

Professor Goodhart points out that the *ratio decidendi* is not the reason for the decision because the reason may be bad and yet the case may come to be an authority. The *ratio decidendi* is also not necessarily the proposition of law stated in the judgment. There may be no rule of law expressly set out or there may be several rules of law set out by different judges as in appellate decisions. The rule may be broader than is necessary to cover the facts of the case before the court. The view of Goodhart is that *ratio decidendi* is nothing more than the decision based on the material facts of the case. There are certain rules by which the material facts can be discovered. Certain facts may be presumed to be immaterial unless expressly stated to be material. Such would be the facts regarding time, place, name, amount, etc. If the judgment does not give the facts, the facts stated in the report must be assumed to be material. If the judgment does state the facts, we must not look beyond that. The difficulty is as to how much of these facts the judge has treated as material. The view of Goodhart is that facts such as time, place, etc., are

presumed to be immaterial unless expressly stated to be material. If the judgment does not distinguish between the material and immaterial facts, all facts mentioned in it must be considered to be material except facts regarding time, place, etc. All facts which the judge has expressly or impliedly treated as immaterial must be ignored. The *ratio decidendi* is the decision as applied to the material facts as ascertained according to the rules suggested by him. If in a later case, the material facts coincide with or are contained within the material facts of the earlier case, then the earlier case is a precedent in the point.

Critics point out that the view of Goodhart that a *ratio decidendi* of a case consists of the decision based on the material facts is superficially true. Its inadequacy becomes evident when it is applied in detail. It rests entirely on the meaning of the phrase "material facts." The theory of Goodhart implies that it is the deciding judge who decides what are the material facts and those can be discovered by a perusal of the judgment. The theory overlooks two points. The first point is that it is within the function of the judges in the subsequent cases to say what they choose to regard as the material facts of the earlier case. The second point is that two persons may agree to a collection of individual facts and yet form different impressions of the group of them as a unit. A case in law is a collection of facts. Whether two cases resemble each other sufficiently so that one can be regarded as a precedent for the other rests entirely on the impression which a particular judge forms of the facts of each case as a whole. According to M. R. Cohen: "You cannot pass from past decisions to future ones without making assumptions. From the statement that a court has ruled so and so in certain cases nothing follows except in so far as the new cases are assumed to be like the old cases. But this likeness depends on our logical analysis of classes of cases." The result is that the *ratio decidendi* of a case depends a good deal on what later tribunals have declared to be the *ratio decidendi*.

### Obiter Dictum

All that is said by the court by the way or the statements of law which go beyond the requirements of the particular case and which lay down a rule that is irrelevant or unnecessary for the

purpose in hand, are called *obiter dicta*. These *dicta* have the force of persuasive precedents only. The judges are not bound to follow them. They can take advantage of them but they are not bound to follow them. *Obiter dicta* help in the growth of law. These sometimes help the cause of the reform of law. The judges are expected to know the law and their observations are bound to carry weight with the government. The defects in the legal system can be pointed out in the *obiter dicta*. The judges are not bound to make their observations on a particular point unless that is strictly relevant to the point in issue but if they feel that they must speak out their own minds on a particular point, the public should be grateful to them for their labour of love.

According to Professor Patterson, an *obiter dictum* is a "statement of law in the opinion which could not logically be a major premise of the selected facts of the decision". In *Lickbarrow v. Mason*, Ashhurst, J. observed that "wherever one of the two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it". This could logically have formed the major premise of the decision if it is ever permissible to treat such a statement as a major premise and the decision that the defendant should have judgment is the conclusion of any syllogism. The observation of Ashhurst, J. was nonetheless a dictum and has been so treated ever since it was made. The *ratio decidendi* was that the right of stoppage in *transitu* is unavailable against an indorsee for value of a bill of lading.

Dr. Goodhart defines *obiter dictum* as "a conclusion based on a fact the existence of which has not been determined by the court".

It is a truism upon which there is no need to enlarge that *dicta* are of varying degrees of persuasiveness. At the end of the scale we have the considered opinion of all the members of the House of Lords who sat to hear a case. At the other end of the scale we have broad observations made on the spur of the moment such as the remark which prompted Lord Abinger to say: "It was not only an *obiter dictum*, but a very wide divaricating *dictum*." *Dicta* of the highest degree of persuasiveness may often, for all practical purposes, be indistinguishable from pronouncements which must be treated as *ratio decidendi* and there are certain

situations where this is the case which are of sufficient importance to be separately mentioned.

According to Lord Sterndale: "*Dicta* are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such *dicta*, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some *dicta*, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the court. It is open, no doubt, to other judges to give decisions contrary to such *dicta*, but much greater weight attaches to them than to the former class."

### **Decision on Authority and Decision on Principle**

Only that precedent is binding on a court which is on all fours with the case before it. If the facts in both cases are the same, the decision is said to be on authority. If the facts of the case are different and the judge merely acts on the analogy of a previous rule, he expounds a new principle of law and his decision is said to be on principle.

### **Disregard of Precedent**

A precedent of conditional authority can be disregarded when it is opposed to a well-recognized existing rule of law or when it is opposed to reason. In both these cases, only a short period should have elapsed since the precedent was set up. If a long time has passed since the precedent was set up, the circumstances may have changed so much that it is not proper and just to retain the precedent. It may also be in the interest of justice to disregard the precedent. It is obvious that a precedent gains in authority with age. If the people have followed a particular precedent for a long time, it is unfair and inexpedient to depart from the same. Even if a precedent is wrong, it may have been followed in a very large number of cases and it may not be desirable to disappoint innumerable parties who may have followed it. This rule is known as the rule of *stare decisis*. It is rightly pointed out that



common errors make law (*communis error facit jus*). If an error has persisted for a long time and people have believed in it, it should be upheld as law. However, if circumstances have changed on account of the lapse of time, it may not be proper and expedient to enforce an old precedent which may be out of touch with the needs of the people. Under the circumstances, it is advisable to evolve a new law. We should follow the principle that "with the ceasing of the reason for the rule, the rule itself ceases" (*cessante ratione cessat lex ipsa*).

According to Salmond: "A moderate lapse of time will give added vigour to a precedent but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the intelligent and perhaps partially forgotten principle with later decisions. The tooth of time will eat away an ancient precedent and greatly deprive it of all authority. The law becomes animated by a different spirit and assumes a different course and the older decision becomes obsolete and inoperative."

### Precedent and Legal Development

Sometimes it is desirable to alter the precedent in the light of changed circumstances. This can be done in many ways. The judicial power of granting new remedies may be used to realize the objective, but this method is not approved by all. Another method is the moulding of different and often scattered legal rules or remedies into a broad and comprehensive principle which combines restatement, remoulding and the making of new law. An outstanding example is the rule in *Rylands v. Fletcher*. It collected several cases of liability without fault which "wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met by the master-mind of Blackburn, J., who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge coordinated them all in their true category." The same has been done by the decision in *Donohue v. Stevenson* in another field.

Though a long-established rule, even if not formally binding on the court, will not lightly be upset, this consideration will be overruled where demands of justice are felt to be weightier. The

House of Lords in *Fibrosa* case (1943 AC 32) did not feel deterred by the fact that the rule in *Chandler v. Webster* was 40 years old, from overruling it. However, where the House of Lords itself has spoken before, the way for non-legislative reform may be barred. Although the doctrine of common employment is generally found irksome and although the courts have whittled it down to a considerable extent, they have felt unable to abolish it.

The irksome effect of binding precedent no longer in accordance with current legal ideals can, to some extent, be overcome by the technique of either ignoring or distinguishing precedent. The possibilities and the limitations of moulding the law in the light of changing legal ideals are well illustrated by the changes in the doctrine of common employment. This doctrine was introduced into the common law as a result of a "prejudiced and onesided notion on what was called public policy", of social ideals now repudiated by legislative reforms and current public opinion. Various judgments in recent times demonstrate the strong aversion of present day judges against a doctrine so much at variance with modern social ideals. However, the House of Lords has not decided to abolish a rule based on industrial and social conditions which have changed and to do justice under new and changing conditions because "in a matter of clear and precise decision such as the doctrine of common employment, it is well settled that the decision of the House is final and that the rule can only be changed by the legislature" (Lord Wright). However, if abolition has proved impossible, the courts have been able to restrict the scope of the doctrine to a remarkable extent.

In recent years, there has been a partial but open departure from the strict rule of *stare decisis* on a lower level. Both the Court of Appeal and the Court of Criminal Appeal in England have substantially modified their attitude in regard to *stare decisis*. In 1944, the Court of Appeal held that the court is entitled and bound to decide which of the two conflicting decisions of its own it will follow. The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*. According to Lord Greene, M. R. : "Two classes of decisions *per incuriam* fall outside the scope of our

inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction—in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such case a subsequent court is bound by the decision of the House of Lords.”

In 1950, the full Court of Criminal Appeal overruled an earlier decision of its own of 1939 on a question of bigamy. Lord Goddard, C. J. observed thus: “This court. . . has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person has been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present. . . .”

### Sources of Judicial Principles

Sometimes the question arises as to how the course of law supplements the existing law by laying down new judicial principles. When there is no authority or rule of law to guide the judges, they look to persuasive sources of law for guidance. Although these sources have no legal authority, they are considered with great respect. Reference is made to foreign law, opinions of distinguished jurists and lawyers and the *obiter dicta* of the judges. Common sense is also employed to arrive at a decision. Sometimes analogies are drawn from the existing law to arrive at the new rules.

### Functions of Judges and Jury

Generally speaking, all questions of law are decided by the judges and all questions of fact are decided by the jury. It is the duty of the judge to explain the law on the point to the members of the jury. It is only then that the members of the jury can be expected to return a correct verdict. All questions of law have to be elucidated by the judge. It is for him to decide whether a particular evidence is permissible or not. However, the evidence

has to be weighed by the members of the jury alone. The jury decides questions of fact which do not admit of any principles. The jury does not lay down any principles of law. It is merely concerned with concrete cases. According to Salmond, the jury decides in *concreto*, not in *abstracto* but the judge strives after the general and the abstract. The decision of a judge can form a precedent but not the verdict of a jury.

According to Dias and Hughes. "The future of the doctrine of precedent in England is a matter of utter conjecture. It is sometimes asserted that the bulk of reported case law is now becoming so unmanageable that the doctrine of *stare decisis* cannot operate effectively for very much longer. The physical labour of discovering all the relevant authorities on a given point, and of keeping up with the annually fresh case law on a topic will become intolerable. Professor Goodhart has pointed out that the position is infinitely worse in America, where the lawyer can expect an annual output of reported cases of some three hundred and fifty volumes. The modest handful of English reports seem less frightening when compared with this teeming profusion. But the difficulty is less acute in America, since the doctrine of *stare decisis* operates here with far less strictness than it does in England. Professor Goodhart indeed suggests that the English lawyer can very well manage with a working library of some six hundred volumes, which he does not consider excessive, but this seems to be a view more appropriate to the freedom of the academic library and the study than to the everyday life of the working lawyer. Sir Carleton Allen has demonstrated the growing frequency of the overlooking of relevant, sometimes vital, authorities by the courts in coming to decisions. This must be due to the multiplication of authorities, and it is a phenomenon which, if it grows, will bring the whole doctrine of *stare decisis* into disrepute. That doctrine can only function with dignity and effect if there is something approaching a guarantee that all relevant cases will be brought to the notice of the courts. This practice is clearly impossible in the work of the magistrates and county courts, and it is therefore necessary to inquire whether the whole theory of precedent is in modern conditions the most effective way of developing English law in the appellate courts. But this is a tonic which cannot be discussed until the alternative to precedent is examined. The

alternative is the codification of English law with a provision depriving all decisions before the code of any binding effect.”

### SUGGESTED READINGS

- Allen, C.K. · *Law in the Making*, Oxford, 1964.
- Blackstone, W. *Commentaries on the Laws of England*, Butterworths.
- Brett, P. *An Essay on Contemporary Jurisprudence*, Butterworths, 1975.
- Cardozo, B.N. · *The Growth of the Law*, Yale University Press, 1924.
- Cardozo, B.N. : *The Nature of the Judicial Process*, Yale University Press, 1921.
- Carter, J.C. : *Law. Its Origin, Growth and Function*, 1907.
- Cross, A.R. N. · *Precedent in English Law*, Oxford, 1968.
- Dewey, J. : *How We Think*, 1909
- Frank, J. N. : *Law and the Modern Mind*, Stevens, 1949.
- Goodhart, A.L. · *Essays in Jurisprudence and the Common Law*, Cambridge University Press, 1931.
- Gray, J.C. *The Nature and Sources of the Law*, New York, 1921
- Jaffe, L. : *English and American Judges as Law-Makers*, Oxford University Press, 1969.
- Kocourek, A. · *An Introduction to the Science of Law*, 1930
- Levi, E. H. : *An Introduction to Legal Reasoning*, Chicago, 1948.
- Llewellyn, K.N. : *Jurisprudence, Realism in Theory and Practice*, Chicago, 1962.
- Llewellyn, K.N. : *The Bramble Bush*, New York, 1930.
- Llewellyn, K.N. : *The Common Law Tradition: Deciding Appeals*, 1960.
- Lloyd, D. · *The Idea of Law*, Penguin, 1964.
- Montrose, J.L. · *Precedent in English Law and Other Essays*
- Morris, C. : *How Lawyers Think*
- Morris, C. : *The Justification of the Law*, University of Pennsylvania Press, 1971.
- Mullins, C. : *In Quest of Justice*, John Murray, 1931.
- Paton, G.W. : *A Textbook of Jurisprudence*, Oxford, 1972.
- Pound, R. : *An Introduction to the Philosophy of Law*, Yale University Press, 1922.
- Pound, R. · *Jurisprudence*, 1959.

- Ross, A. : *On Law and Justice*, Stevens, 1958.
- Salmond, J W. : *Jurisprudence*.
- Stone, J. : *Legal System and Lawyers' Reasonings*, Stevens & Sons, 1964.
- Stone, J. . *Social Dimensions of Law and Justice*, Stevens, 1966.
- Synder, O C. : *Preface to Jurisprudence*, 1954
- Vinogradoff, P. : *Commonsense in Law*, Oxford University Press, 1959.
- Von Mehren, A T. : *The Civil Law System Cases and Materials*, Prentice-Hall, 1957. r
- Wasserstrom, R.A. : *The Judicial Decision*, Stanford, 1961.
- Williams, G.L. : *Learning the Law*, Stevens & Sons, 1973.
- Wright, R.A. : *Legal Essays and Addresses*, Cambridge University Press, 1939.

alternative is the codification of English law with a provision depriving all decisions before the code of any binding effect."

### SUGGESTED READINGS

- Allen, C.K. : *Law in the Making*, Oxford, 1964.
- Blackstone, W. : *Commentaries on the Laws of England*, Butterworths.
- Brett, P. : *An Essay on Contemporary Jurisprudence*, Butterworths, 1975.
- Cardozo, B.N. : *The Growth of the Law*, Yale University Press, 1924.
- Cardozo, B.N. : *The Nature of the Judicial Process*, Yale University Press, 1921.
- Carter, J.C. : *Law: Its Origin, Growth and Function*, 1907.
- Cross, A.R N. : *Precedent in English Law*, Oxford, 1968.
- Dewey, J. : *How We Think*, 1909.
- Frank, J N. : *Law and the Modern Mind*, Stevens, 1949.
- Goodhart, A.L. : *Essays in Jurisprudence and the Common Law*, Cambridge University Press, 1931.
- Gray, J.C. : *The Nature and Sources of the Law*, New York, 1921.
- Jaffe, L. : *English and American Judges as Law-Makers*, Oxford University Press, 1969.
- Kocourek, A. : *An Introduction to the Science of Law*, 1930.
- Levi, E H. : *An Introduction to Legal Reasoning*, Chicago, 1948.
- Llewellyn, K.N. : *Jurisprudence, Realism in Theory and Practice*, Chicago, 1962.
- Llewellyn, K.N. : *The Bramble Bush*, New York, 1930.
- Llewellyn, K.N. : *The Common Law Tradition: Deciding Appeals*, 1960.
- Lloyd, D. : *The Idea of Law*, Penguin, 1964.
- Montrose, J.L. : *Precedent in English Law and Other Essays*.
- Morris, C. : *How Lawyers Think*.
- Morris, C. : *The Justification of the Law*, University of Pennsylvania Press, 1971.
- Mullins, C. : *In Quest of Justice*, John Murray, 1931.
- Paton, G.W. : *A Textbook of Jurisprudence*, Oxford, 1972.
- Pound, R. : *An Introduction to the Philosophy of Law*, Yale University Press, 1922.
- Pound, R. : *Jurisprudence*, 1959.

- FINE, A. : *On Law and Justice*, Stevens, 1959.  
 GILBERT, J. W. : *Jurisprudence*.  
 KATZ, J. : *Legal Systems and Lawyers' Reasonings*, Stevens & Sons, 1964.  
 KATZ, J. : *Social Foundations of Law and Justice*, Stevens, 1956.  
 LITTLE, D. C. : *Principles of Jurisprudence*, 1954.  
 MACHIAVELLI, N. P. : *Concepts in Law*, Oxford University Press, 1959.  
 VAN METER, A. J. : *The Civil Law System: Law and Materials*, Prentice-Hall, 1957.  
 WATKINSON, P. A. : *The Jurisical Deviser*, Stanford, 1961.  
 WILLIAMS, G. L. : *Learning the Law*, Stevens & Sons, 1973.  
 WILSON, P. A. : *Legal Ethics and Administration*, Cambridge University Press, 1971.



# XI

## CUSTOM

### Definition

Custom is also an important source of law and it is desirable to define the same. According to Salmond, custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. According to Keeton, customary law may be defined as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as sources of law because they are generally followed by the political society as a whole or by some part of it. According to Carter: "The simplest definition of custom is that it is the uniformity of conduct of all persons under like circumstances." According to Holland, custom is a generally observed course of conduct. The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common: one man crosses the common in the direction which is suggested either by the purpose he has in view or by mere accident. If others follow in the same track—which they are likely to do after it has once been trodden—a path is made. According to Austin, custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior. According to Allen, custom as a legal and social phenomenon grows up by forces inherent in society, forces partly of reason and necessity and partly of suggestion and limitation. According to Halsbury, a custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. The Judicial Committee of the Privy Council has defined custom as a rule which in a particular family or in a particular district has from long usage obtained the force of law. In the *Tanistry* case (30 ER 516), custom was described

in these words: "It is *jus non scriptum* and made by the people in respect of the place where the custom obtains. For where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent iteration and multiplication of this act that the custom is made and being used from time to time which memory runneth not to the contrary obtains the force of law."

### Origin of Custom

Custom is the oldest form of law-making. A study of ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others

When the same thing was done again and again in a particular way, it assumed the form of custom. Holland rightly points out that custom originated in the conscious choice by the people of the more convenient of the two acts. Imitation also must have played an important part in the growth of customs.

According to Maine. "The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being; and, if they are retained in their integrity until new social wants have taught new practices, the upward march of society is almost certain. But unhappily there is a law of development whichever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that *usage which is reasonable generates usage which is unreasonable*. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one

thing, feels a natural terror in doing any other thing which is remotely like it ”

According to Bagehot “The most intellectual of men are moved quite as much by circumstances which they are used to as by their own will. The active voluntary part of a man is very small, and if it were not reconvinized by a sleepy kind of habit, its results would be nil. We could not do every day out of our own heads all we have to do. We should accomplish nothing, for all our energies would be frittered away in minor attempts at petty improvements. One man, too, would go off from the known track in one direction, and one in another ; so that when a crisis came requiring massed combination, no two men would be near enough to act together. It is the dull traditional habit of mankind that guides most men’s actions, and is the steady frame in which each new artist must set the picture that he paints. And all this traditional part of human nature is, *ex vi termini*, most easily impressed and acted on by that which is handed down ” According to Trade, imitation is not mere curiosity of psychology, it is one of the primary laws of nature. Nature perpetuates itself by repetition and the three fundamental forms of repetition are rhythm or undulation, generation and imitation.

According to Vinogradoff: “Social customs themselves obviously did not take their origin from an assembly or tribunal. They grew up by gradual process in the households and daily relations of the clans, and the magistrate only came in at a later stage, when the custom was already in operation, and added to the sanction of general recognition the express formulation of judicial and expert authority.” (*Historical Jurisprudence*).

A study of ancient society shows that law-making was not the business of the kings. Law of the country was to be found in the customs of the people. The people were accustomed to a particular way of living and doing things and that was to be found in the customs of society. The King was anxious to rule the people according to the popular notions of right and wrong and those were to be found in their customs. Later on, the same custom was recognised by the sovereign by putting his imprimatur on it. It was in this way that custom was transformed into law. Custom was vague in the beginning but it became definite and

concrete with the passage of time. It became a rule of law when it was recognised by the sovereign. Sometimes it was adopted by the legislature in its enactments. Sometimes it was recognised by the courts in their decisions. The judicial decisions on Hindu law are based on the customs of the Hindus. Custom is considered as transcendental law. According to Salmond, the importance of custom diminishes as the legal system grows. In countries like England, it has been almost entirely superseded by legislation and precedent. Even the common law of England was originally based on the customs of the country. The travelling judges went from place to place to try cases and based their decisions on the customs prevailing in various parts of the country. As they gave similar decisions in similar cases in all parts of the country, a law common to the whole country came into existence and this came to be known as the common law. It is true that the common law of England grew out of the decisions given by the travelling judges but the decisions of the travelling judges were originally based on the customs of the country.

According to Ancel: "Writers are in the habit of giving their own interpretations of the law, which are sometimes contrary to the solutions of the courts, but which they nevertheless consider as the only real expression of French law. On many important points, there exists a doctrine of the courts and doctrine of law writers. So you can find in France a law which is printed in books and taught in universities, and which yet differs much from, even when not contrary to, the law applied by the courts of justice. Writers nowadays take care to state not only their own opinion, but also the opinion of the jurisprudence, but yet they put forward their solution as the only legal one."

### **Binding Force of Custom**

There are many reasons why custom is given the force of law :

(1) Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public policy. The very fact that any rule has the sanction of custom raises a presumption that it deserves the sanction of law also. Judges are inclined to accept those rules which have in their favour the prestige and authority of long acceptance. Custom is the external and visible sign of the national

conscience and as such is accepted by the courts of law as an authoritative guide. To quote Salmond: "Custom is to society what law is to the State. Each is the expression and realisation of the measure of man's insight and ability, of the principles of right and justice. The law embodies those principles as they commend themselves to the incorporate community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not by the power of the State, but by the public opinion of the society at large."

(2) Another reason for the binding force of custom is that the existence of an established usage is the basis of a rational expectation of its continuance in the future. Justice demands that this expectation should be fulfilled and not frustrated. The observance of a custom may not be ideally just and reasonable, but it cannot be denied that it brings stability and certainty in the legal order. In the case of California, the customs which developed on the goldfields regarding the regulation of mining industry, were later on given the authority of law by the legislature. In the case of New Zealand, the customs of the Maoris, the original inhabitants of the country, were recognised by the Native Rights Act of 1865, which provided thus: "Every title to or interest in land over which the native title has not been extinguished shall be determined according to the ancient custom and usage of the Maori people so far as the same can be ascertained."

(3) Sometimes a custom is observed by a large number of persons in society and in course of time the same comes to have the force of law. Reference may be made in this connection to the custom of giving three days of grace on bills of exchange.

(4) Custom rests on the popular conviction that it is in the interests of society. This conviction is so strong that it is not found desirable to go against it.

(5) According to Paton: "Custom is useful to the law-giver and codifier in two ways. It provides the material out of which the law can be fashioned—it is too great an intellectual effort to create law *de novo*. Psychologically, it is easier to secure reverence for a code if it claim to be based on customs 'immemorially observed and themselves true even though historically the claim cannot be

substantiated. There is inevitably a tendency to adopt the maxim 'Whatever has been authority in the past is a safe guide for the future' "

### Theories regarding Transformation of Custom into Law

There are two theories regarding the question as to when a custom is transformed into law. Those are the historical theory and analytical theory.

#### (a) Historical Theory

According to the historical theory, the growth of law does not depend upon the arbitrary will of any individual. It does not depend upon any accident. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people. Savigny gives it the name of Volkgeist. To quote Savigny: "Law like language stands in organic connection with nature or character of the people and evolves with the people." Again, "the foundation of the law has its existence, its reality in the common consciousness of the people. . . . We become acquainted with it as it manifests itself in external acts, as it appears in practice, manners and custom. *Custom is the sign or badge of positive law and not its foundation or a ground of origin.*" The view of Savigny is that custom is the type of all law and law is valid and just only in so far as it makes known and objectifies in concrete forms the true legal instinct of the community which it purports to govern.

According to Fuchta, custom is not only self-sufficient and independent of State imprimatur but is a condition to all sound legislation. According to Arndt: "Customary law contains the ground of its validity in itself. It is law by virtue of its own nature, as an expression of the general consciousness of right, not by virtue of the sanction, express or tacit, of any legislature." James Carter writes: "What has governed the conduct of men from the beginning of time will continue to govern it to the end of time. The human nature is not likely to undergo a radical change and therefore that to which we give the name of law always has been, still is, and will for ever continue to be, custom."

The historical theory has been criticised by many writers. According to Paton, the growth of most of the customs is not the result of any conscious thought but of tentative practice. According to Gray, "Not only does custom play a small part at the present day as a source of non-contractual law, but it is doubtful if it ever did, doubtful whether, at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated legal rules. It has often been assumed, almost as a matter of course, that legal customs preceded judicial decisions and that the latter have served to give expression to the former but of this there appears to be little proof. It seems at least as probable that custom arose from legal decisions." According to Jethrow Brown "That custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the pretence of declaring custom, judges frequently give rise to it." According to Allen, all customs cannot be attributed to the common consciousness of the people. In many cases, customs have arisen on account of the convenience of the ruling class. According to Sir Henry Maine, "Custom is a conception posterior to that of Themistes or judgments." Themistes were the awards which were dictated to the King by the Greek goddess of justice. It is later on that custom came into existence.

The view of the historical school is not balanced. Customs have not always arisen out of convenience or the needs of the people. Sometimes they have been imposed upon the people by the ruling class. Though there are some rules of law which are based on the common conviction of the people, the majority of them are so complicated and technical that the common conviction might never have thought of them. The historical jurists did not pay proper attention to the fact that the State has the power of abrogating a custom. They underestimated the creative roles of the judges and legislators which are so important in modern times.

#### (b) *Analytical Theory*

The great advocates of the analytical theory are Austin, Holland, Gray, Allen and Vinogradoff. According to Austin, custom is a source of law and not law itself. Customs are not

positive laws until their existence is recognized by the decisions of the courts. A custom becomes law when it is embodied in an Act of the legislature. It becomes law when it is enforced by the State. It is not every custom that is binding. Only those customs are valid which satisfy the judicial test. The sovereign can abolish a custom. A custom is law only because the sovereign allows it to be so. Austin writes. "A customary law may take the quality of a legal rule in two ways. It may be adopted by a sovereign or subordinate legislature and turned into a law in the direct mode (statute law) or it may be taken as a ground of a judicial decision, which afterwards obtains as a precedent and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign." Austin maintains that custom has only persuasive value. Customary practices have to be recognized by courts before they become law. While deciding a case, if the judge finds that no statute governs the facts of the case, he can seek the help of custom but he may follow it or not. That depends upon his discretion. Custom has only persuasive value and does not become law until it is followed by the courts. In the words of Austin. "Law styled customary is not to be considered a distinct kind of law. It is nothing but judiciary law founded upon anterior custom."

According to Holland, customs are not laws when they arise but they are largely adopted into laws by State recognition. English courts require that not only the existence of a custom be proved but it should also be proved that the same is reasonable. The legislature can also abrogate customs whether partially or wholly. To quote Holland: "Binding authority has thus been conceded to custom, provided it fulfils certain requirements the nature of which has also long since been settled and provided it is not superseded by law of a higher authority. When, therefore, a given set of circumstances is brought into court and the court decides upon them by bringing them within the operation of a custom, the court appeals to that custom as it might to any other pre-existent law. It does not *proprio motu* then for the first time make that custom a law, it merely decides as a fact that there exists a legal custom about which there might up to that moment



have been some question, as there might about the interpretation of an Act of Parliament."

According to Gray: "The true view, as I submit, is that the law is what the judges declare; that statute, precedents, the opinions of the learned experts, customs and morality are the source of the law; that at the back of everything lies the opinions of the ruling spirits of the community who have the power to close any of the sources; but that so long as they do not interfere, the judges in establishing law have recourse to these sources. Custom is one of them, but to make it not only one source but the sole source of law itself, requires a theory which is as little to be trusted as that of Austin."

The analytical theory has been criticised by Allen in these words. "Custom grows by conduct and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law or by other determinate authority. The characteristic feature of the great majority of customs is that they are essentially non-litigious in origin. They arise from any conflict of right adjusted by a supreme arbiter, not from any claim of *meum* against *tuum*, but from practices prompted by the convenience of the society and of the individual, so far as they are promoted by any conscious purpose at all. The starting point of all custom is convention rather than conflict, just as the starting point of all society is cooperation rather than dissension." According to Vinogradoff: "It is not conflicts that initiate rules of legal observance, but the practices of everyday directed by the give and take considerations of reasonable intercourse and social cooperation. Neither succession nor property, nor possession nor contract, started from direct legislation or from direct conflict. Succession has its roots in the necessary arrangements of the household on the death of its manager; property began with occupation; possession is reducible to *de facto* detentions; origins of contract go back to the customs of barter."

The analytical theory contains some truth but that is only partial and not the whole truth. The analytical approach is defective due to many reasons. The bulk of customs is non-litigious and hence it does not come before the courts. The society regulates its conduct in accordance with those customs. In

most cases, customs are recognised not with the assumption that that recognition gives them the sanctity of law but with the assumption that they are law and have to be treated as such. Though the courts play a creative role in rationalising and shaping customs, they draw their raw material from customs. Hence the view that a custom is not law until it receives the recognition of or declaration by the sovereign is not fully correct.

The correct position lies in a synthesis of the two views and by adopting a sociological point of view. Customs lie in the foundation of all legal systems. They come into existence with the existence of society. Custom is to society what law is to the State. Each is the expression and realisation of the principles of right and justice. Sometimes we can trace some reason, need or convenience behind some custom but that is not so in every case. It is also not correct that customs are always of local origin and they arise out of the conviction of the people. Sometimes foreign customs such as the customs of the ruling class and sometimes international customs, such as the commercial customs, are adopted and observed. When society develops judicial organs, it exercises some control over them. With the development of society, many other forces exercise their influence on customs, e.g., jurists, codifiers, law-givers etc. Customs are rationalised, systematized and incorporated and embodied in legal rules. These influences can be traced in any legal system. There was the creative role of the magistrates in Roman law. Equity judges played their part in English law. English writers from Bracton to Blackstone made their own contributions. A similar contribution was made to Hindu law by the Smritikaras and the Privy Council. They interpreted and moulded the customs. One must appreciate their contributions if one wants to understand the proper course of the development of customs. In developed legal systems, courts always exercise some control over customs. Their function is essentially that of scrutiny. They have to find out how far an alleged custom is a rule of conduct or is observed and how far it satisfies the tests laid down for customs. If the court comes to the conclusion that an alleged custom is in existence and is generally observed and satisfies the tests, its duty is to declare it. The function of the court is "declaratory rather than constitutive".

The view of Vinogradoff is that most of the branches of law did not start from legislation or from any other source. They

started from customs. This applies to the law of succession, property, possession and contract. Customs started in one form or the other in primitive society. Succession started from the necessary arrangement of the household on the death of the manager or the head of the family. Property began from occupation, possession from *de facto* retention, and contract from the custom of barter. Those customs do not have the same form and substance which they had in the beginning. They are no longer customs and have become a part of the law. Judges, legislators, jurists and other agencies have transformed customs into laws. The conclusion is that customs are the basis of most of the laws but those have been moulded by judges, legislators and jurists in course of time.

### Kinds of Customs

#### *Legal Custom*

Customs are of two kinds, legal and conventional. The *legal custom* is one whose legal authority is absolute. It possesses the force of law *proprio vigore*. The parties affected may agree to a legal custom or not but they are bound by the same. Legal customs are of two kinds, local customs and general custom. Local customs apply only to a locality and general custom applies to the whole country.

#### *Conventional Custom or Usage*

A conventional custom is one whose authority is conditional on its acceptance and incorporation in the agreement between the parties to be bound by it. A conventional custom is an established practice which is legally binding because it has been expressly or impliedly incorporated in a contract between the parties concerned. When two parties enter into an agreement, they do not put down in black and white all the terms of the contract. There are certain implied terms which can be omitted. The expressed terms of the contract are merely its framework or skeleton. The contract becomes complete only when we take into consideration the implied terms. The intention of the parties to the contract can be gathered from the customary law and other things which can reasonably be taken to be implied in the contract. The customs of the locality or trade or profession are

taken to be included in the contract. The courts are bound to take notice of these customs.

In the case of *Huth .v. Warren*, the Court of Exchequer held that a lease of agricultural land must be read subject to the custom of the locality that the tenant was bound to observe a certain course of husbandry and that he was entitled to an allowance for seed and labour on quitting the land. Baron Parke observed thus: "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. . . This has been done upon the principles of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages."

Certain conditions must be satisfied before a court is entitled to incorporate the usages into contracts. The usage must be so well-established as to be notorious. This is necessary because without notoriety, it will be impossible to show that both parties were contracting in the light of the usage. Another condition is that the usage cannot alter the general law of the land whether statutory or common law. The reason is that usage derives its force from its incorporation into an agreement and can have no power to alter the law than an express agreement. Another condition is that the usage must be reasonable. A custom or usage will not be enforced in a particular case if it purports to nullify or vary the express terms of the contract. The sole function of such usage is to imply the terms when the contract is silent. The parties cannot be understood to have contracted in the light of a convention which they have expressly contradicted. To quote Lord Birkenhead: "The learned judge has in effect declared that a custom may be given effect to in commercial matters which is entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well-known a custom, have nevertheless thought proper to enter."

There is a process by which conventional usage comes to have the force of law. To begin with, when a usage begins to emerge,

the court will not take notice of it unless it is expressly provided in each case. However, in course of time, the usage becomes sufficiently notorious before the courts for them to dispense with proof in the particular case and to take judicial notice of it. At this stage, the usage already acquires the character of settled law. Later on, the legislature may wish to codify or enact upon the particular branch of law in which this body of usage occurs. The enactment normally takes the form of a statement of law as it is found in the decisions of the courts. This process has actually been employed in the case of the Bills of Exchange Act, the Marine Insurance Act and the Sale of Goods Act.

There is a distinction between a custom and a usage. A custom is binding irrespective of the consent of the parties to be bound thereby. A usage is binding only when it is not expressly excluded by the terms of the agreement entered into by the parties. A custom to be valid should have existed from time immemorial but that is not so in the case of usage. A usage of recent origin can be given effect to by the courts on the ground that the parties had contracted with reference to that usage. A local custom can freely derogate from the general or common law of the realm but not from the statute law. A usage can derogate from the general or common law to the extent to which it is possible to exclude the common law by specific and express contract between the parties. If in any particular case, common law cannot be excluded by express agreement, it cannot be excluded by usage also. However, custom can override the common law.

### *The Law Merchant*

The Law Merchant is the accumulated product of the merchants to which sanction has been given by the decisions of the courts. The law of negotiable instruments, before it was embodied in the statute, was a part of the Law Merchant which is conventional custom. Its law-creating efficacy is dependent upon the fact that it has met with acceptance extensively among traders and courts, will be prepared to construe their contracts in the light of the law merchant and import into the contracts implied conditions based upon mercantile usage. Any principle which can be introduced by express agreement can also be introduced by means of the law merchant which is not a perma-

nently fixed and stereotyped body of law. The exigencies of trade are continually expanding and the courts of the country are usually not slow in according recognition to the expedients devised by traders for satisfying them. If any part of the general law is absolute and admits of no contract to the contrary, it cannot be impaired by the law merchant which is only a conventional custom and can operate only by means of an implied agreement. This is based on the theory that what cannot be done directly by express agreement cannot be done indirectly by setting up a mercantile custom.

### *Legal Custom*

Legal custom is of two kinds. It is either local custom or the general custom of the realm. Local custom is that which prevails in some defined locality only such as borough or county and constitutes a source of law for that place only. The general custom prevails throughout England and constitutes one of the sources of the common law of the country. The term custom in its narrowest sense means local custom exclusively. At the present day, local customs consist for the most part of customary rights vested in the inhabitants of a particular place to the use for diverse purposes of land held by others in private ownership, e g, a custom for the inhabitants of a parish to enter on certain land for the purpose of dancing, games and recreation.

In order that a local custom may be valid and operative as a source of law, it must conform to certain requirements. It must be reasonable. It must conform to statute law. It must have been observed as obligatory. It must be of immemorial antiquity.

A custom must be reasonable. The authority of usage is not absolute but conditional on a certain measure of conformity with justice and public utility. This does not mean that courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom or whenever they think that better rule could be formulated in the exercise of their judgment. That would deprive custom of all authority, whether absolute or conditional. The true rule is that in order to be deprived of legal efficacy, a custom must be so obviously and seriously repugnant to right and reason that to enforce it as law would do

more mischief than that which would result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity.

Another requirement is that a local custom must be in conformity with statute law. It must not be contrary to an Act of Parliament. In the words of Coke: "No custom or prescription can take away force of an Act of Parliament."

Another requisite of a valid custom is that it must be observed as of right. This does not mean that the custom must be acquiesced in as a matter of moral right. The custom must have been followed openly, without the necessity for recourse to force, and without the permission of those adversely affected by the custom being regarded as necessary.

Another requirement of a local custom is its immemorial antiquity. In order to have the force of law, the custom must be immemorial. It must have existed for so long a time that "the memory of man runneth not to the contrary". Recent or modern custom is of no account.

### *General Custom*

A general custom is that which prevails throughout the country and constitutes one of the sources of the law of the land. There was a time when common law was considered to be the same as the general custom of the realm followed from ancient times. To quote: "The common law of the realm is the common custom of the realm." This view held the field up to the end of the 18th century. However, it cannot be denied that it is incorrect to regard common law as the embodiment of the general custom of the land. No doubt common law is partly based on the customs of England as the travelling judges adopted some of the local customs in their decisions, but they also used their own discretion in taking help from natural law, Canon law and the principles of Roman civil law.

There is no unanimity of opinion on the point whether the general custom must be immemorial or not. According to one decision, a recent trade usage treating debentures payable to bearer cannot be recognized as it is against the common law. In another case, it has been held that an instrument which is trans-

ferable by delivery under a trade usage, though recently developed, is a negotiable instrument. If we insist that a general custom must be immemorial, the result is that once such a custom is recognized by a court of law, it cannot be changed or abrogated by a new custom and thus the growth of customary law is checked. The general custom which forms a part of the law merchant prevents new trade customs of a general nature from developing.

The view of Salmond is that the general custom must be immemorial. It is true that trade-customs of a comparatively recent growth are occasionally recognized by the courts, but those are exceptions only. The general rule is that a general custom cannot have the force of law unless and until it is also immemorial. According to Parker, when a general custom is adopted as a precedent, it is accepted as a form of conventional law. It is adopted because common law provides that an agreement should be enforced according to its terms. A general custom, once recognized, cannot be set aside by a later general custom. A new general trade-custom cannot derogate from an earlier custom but can develop or add to it. A general trade-custom cannot become law if it conflicts with law.

According to Keeton, a general custom must satisfy certain conditions if it is to be a source of law. It must be reasonable. It must be generally followed and accepted as binding. It must have existed from immemorial times. It must not conflict with the statute law of the country. It should not conflict with the common law of the country.

### **Requisites of a Valid Custom**

(1) A custom to be valid must be proved to be *immemorial*. According to Blackstone: "A custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if anyone can show the beginning of it, it is no good custom." According to Littleton: "No custom is to be allowed but such custom as hath been used by title of prescription, that is to say, from time out of mind." The idea of immemorial custom was derived by the law of England from the canon law and by the canon law from the civil law. English law places a limit to legal memory and fixes 1189 A. D. as enough to constitute the antiquity of a custom. Undoub-



tedly, the year 1189 is an arbitrary limit. If we can trace back a certain custom as being prevalent from 1189 without interruption, the validity of a custom is established. It is to be observed that in the case of India, the English law regarding legal memory is not applied. All that is required to be proved is that the alleged custom is ancient. In the case of *Subham v. Nawab*, the Privy Council observed: "It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient: but it is not of the essence of the rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district." [ILR (1941) Lah 154 (PC)]. In *Baba Narayan v. Saboosa*, Sir George Rankin observed: "In India, while a custom need not be immemorial, the requirement of long usage is essential since it is from this that custom derives its force as governing the parties' rights in place of the general law." [(1943) 2 MLJ 186].

(2) Another essential of a valid custom is that it must be *reasonable*. It must be useful and convenient to the society. If any party challenges a custom, it must satisfy the court that the custom is unreasonable. To ascertain the reasonableness of a custom, it must be traced back to the time of its origin. The unreasonableness of a custom must be so great that its enforcement results in greater harm than if there were no custom at all. The bye-laws in England are required to satisfy the test of reasonableness. If they are not reasonable, they are set aside by the courts. Where the courts find a custom in existence which, either by aberration or by change in law, since its origin, not merely differs from but directly conflicts with an essential legal principle (including the principle of public policy), these have power in modern communities to put an end to the custom. In short, custom, once indisputably proved, is law, but the courts are empowered, on sufficient reason, to change the law which it

embodies. According to Prof Allen, the unreasonableness of the custom must be proved and not its reasonableness

(3) Only that custom is valid which has been *continuously observed* without any interruption from time immemorial. If a custom has not been followed continuously and uninterruptedly for a long time, the presumption is that it never existed at all.

(4) The enjoyment of a custom must be a peaceable one. If that is not so, consent is presumed to be wanting in it.

(5) A valid custom must be certain and definite. In one case, a customary easement was claimed to cast on the lands of neighbours the shadow of overhanging trees. It was held to be vague and indefinite on the ground that the shadow of overhanging trees was a changing occurrence.

(6) A custom is valid if its observance is compulsory. An optional observance is ineffective. It is the duty of the court to satisfy itself that the custom is observed by all concerned and not by anyone who pleases to do so. Blackstone says: "A custom that all the inhabitants shall be rated towards the maintenance of a bridge, will be good, but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd and indeed no custom at all."

(7) The custom must be general or universal. According to Carter. "Custom is effectual only when it is universal or nearly so. In the absence of unanimity of opinion, custom becomes powerless, or rather does not exist."

(8) A valid custom must not be opposed to public policy or the principles of morality. In *Raja Varma v Ravi Varma*, the question for decision was whether a custom recognizing the sale of the trusteeship of a temple was a valid custom or not. The Privy Council held "If the custom set up was one to sanction not merely the transfer of the trusteeship, but as in this case the sale of a trusteeship is for the pecuniary advantage of the trustee, they would be disposed to hold that circumstance alone would justify a decision that the custom was bad in law" [ILR 1 Mad 235 (PC)].

(9) A valid custom must not conflict with the statute law of the country. According to Coke: "No custom or prescription

can take away the force of an Act of Parliament." A State can abrogate a custom and not *vice versa*. However, it is to be observed that there are writers who hold different views on this point. According to them, legislation has no inherent superiority over custom. If the enacted law comes first, it can be repealed or modified by a later custom. If the customary law is the earlier, it can similarly be dealt with by later enacted law. According to Savigny: "If we consider customs and statutes with respect to their legal efficacy, we must put them on the same level. Customary law may complete, modify or repeal a statute; it may create a new rule and substitute it for the statutory rule which it has abolished." According to Windscheid: "The power of customary law is equal to that of statutory law. It may, therefore, not merely supplement but also derogate from the existing law. And this is true not merely of rules of customary law *inter se* but also of the relations of customary law to statute law." Allen writes: "Age cannot wither an Act of Parliament, and at no time, so far as I am aware, has it ever been admitted that a statute might become inoperative through obsolescence." (*Law in the Making*, p. 393).

According to Blackstone: "Customs must be consistent with each other; one custom cannot be set up in opposition to another. For if both are really customs then both are of equal antiquity, and both established by mutual consent, which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom."

### Custom and Prescription

When a thing is practised for a long time, it gives rise to a rule of law known as custom, but if it gives rise to a right, it is called prescription. A custom is a source of law but a prescription is a source of right. For example, in a certain community of a particular locality, a daughter has priority over collaterals of the third or remoter degree from time immemorial. It is a local custom and it gives rise to a rule of law. If X and his forefathers

have from time immemorial been grazing cattle on a particular land belonging to  $X$ , it gives rise to a right in  $X$  and it is called prescription. On account of their similarity, local custom and prescription were both bracketed under the heading of particular custom and prescription was regarded as a branch of custom. Prescription was considered as a particular custom confined to an individual. Both local custom and prescription require the same essentials to be valid. However, at present, local custom and prescription are clearly distinguished as there are prescriptive rights which do not show any similarity to local custom. The rule regarding time immemorial has been replaced in the case of prescription. Uninterrupted enjoyment for 20 years is considered to be enough to acquire a right to light and air.

Custom is based on long usage but prescription is based on lost grant and operates as a source of right. A custom must be reasonable and conform to justice, public policy and utility, but that is not necessary in the case of prescription. Custom is a generally observed course of conduct and has the force of law on account of long usage. Prescription means the acquisition of a right or title by user or possession in the manner laid down by law. Local custom relates to a particular locality or the members of a particular class. It is *lex loci*. Prescription is personal and applies to persons. While custom must be ancient, prescription requires only a period of 20 years.

### **Present Position of Customary Law**

In primitive society, custom was the sole source of law. There was no other mechanism to perform that function. However, with the passage of time, the importance of custom began to decline. The judgments of the courts began to cover some of the fields previously occupied by custom. Later on, legislatures began to pass laws dealing with subjects previously covered by custom. The law-creative activity of custom is now on the decline and has practically exhausted itself. Most of the customs have become a part of the law of the land. One of the tests of a valid custom is that it should be ancient. In England, a valid custom must have had its origin at least as far back as 1189 A.D. This shows that at present custom cannot be a living and operative source of law. New situations arise in quick succession. Modern

society is changing at a very rapid pace. What was ten years ago is not the same today. Modern society cannot wait for generations so that a custom becomes ancient and is recognised by court. Custom as a source of law has lost its former position and importance. Modern man looks to legislature for enacting laws at a speed which is demanded by the atomic age.

### SUGGESTED READINGS

- |                  |  |
|------------------|--|
| Allen, C.K.      | : <i>Law in the Making</i> , Oxford, 1964.                                 |
| Austin, J.       | : <i>Lectures on Jurisprudence</i> .                                       |
| Bentham, J.      | : <i>Of Laws in General</i> , 1970.  |
| Brown, W. J.     | : <i>The Austinian Theory of Law</i> , 1906.                               |
| Cardozo, B.N.    | : <i>The Nature of the Judicial Process</i> , Yale University Press, 1921. |
| Carter, J.C.     | : <i>Law: Its Origin, Growth and Function</i> , 1907.                      |
| Clark, E.G.      | : <i>Practical Jurisprudence</i> , Cambridge University Press, 1883.       |
| Cohen, M.R.      | : <i>Reason and Law</i> , 1950.  |
| Cross, A. R.N.   | : <i>Precedent in English Law</i> , Oxford, 1968                           |
| Devlin, P.       | : <i>Samples of Law-Making</i> , Oxford University Press, 1962             |
| Gray, J.C.       | : <i>The Nature and Sources of the Law</i> , New York, 1921.               |
| Hall, J.         | : <i>Readings in Jurisprudence</i> , 1938                                  |
| Hart, H.L. A.    | : <i>The Concept of Law</i> , Oxford, 1975.                                |
| Holland, T.E.    | : <i>The Elements of Jurisprudence</i> , Oxford, 1924.                     |
| Keeton, G.W.     | : <i>The Elementary Principles of Jurisprudence</i> , 1949.                |
| Kelsen, H.       | : <i>General Theory of Law and State</i> , 1949.                           |
| Kocourek, A.     | : <i>An Introduction to the Science of Law</i> , 1930.                     |
| Korunov, N.M.    | : <i>General Theory of Law</i> , 1909.                                     |
| Lloyd, D.        | : <i>Introduction to Jurisprudence</i> , 1972.                             |
| Lloyd, D.        | : <i>The Idea of Law</i> , Penguin Books, 1964.                            |
| Markby, W.       | : <i>Elements of Law</i> , Oxford, 1905.                                   |
| Paton, G. W.     | : <i>A Text-Book of Jurisprudence</i> , Oxford, 1972.                      |
| Patterson, E. W. | : <i>Jurisprudence</i> , 1953.   |
| Pollock, F.      | : <i>Essays in Jurisprudence and Ethics</i> .                              |
| Pound, R.        | : <i>Jurisprudence</i> , 1959.   |
| Sadler, G. T.    | : <i>The Relation of Custom to Law</i> , Syceet and Maxwell, 1919          |
| Salmond, J.W.    | : <i>Jurisprudence</i> , 1966.   |
| Silving, H.      | : <i>Sources of Law</i> , New York, 1968.                                  |
| Vinogradoff, E.  | : <i>Commonsense in Law</i> , Oxford University Press, 1959.               |
| Vinogradoff, E.  | : <i>Customs and Rights</i> , Oslo, 1925.                                  |

## XII

# PROFESSIONAL OPINIONS AND RELIGION

### Professional Opinions

Professional opinions are also a source of law. These can be discussed under the heads of the *obiter dicta* of judges, general opinions of the legal profession and opinions of writers upon legal subjects.

(1) The *obiter dicta* are the statements of law made by a judge in the course of a decision, arising naturally out of the circumstances of the case, but not necessary for the decision. The value of these *dicta* as a source of law depends upon the reputation of the judge and the relation of the rest of the law upon the specific point in question and upon similar topics.

(2) The *legal profession* consists of the judges, the practising lawyers and teachers of law. These branches of the legal profession exercise a powerful influence upon the development of law. Although the influence of professional opinion is not so great in England as was the case in Rome, yet their influence is considerable. English judges are chosen from the ranks of the Bar and teachers of law and their decisions reflect rather the opinions of their order than of themselves. Many existing rules of law owe their origin to the support of the legal profession. In the case of India, the judges are recruited from the services and the Bar and their views have done a lot for the growth of law.

According to Sir Amir Ali: "The four principal schools of law among the Sunnis named after their founders, originated with certain great jurists, to whom has been assigned the distinguished position of Mujahid Imams, namely, Expounders of Law par excellence. By virtue of their learning and their eminence, they were entitled not to be bound to the interpretation of the law by any precedent, but to interpret it according to their own judgment and analogy."

(3) The *opinions of the writers of text-books* also help the growth of law. It has been particularly so in the case of international law. Its rules have frequently depended upon the opinions of jurists. International law in its present form would not have been possible without the work of writers like Grotius. The influence of writers of text-books was greater in Roman law than in English law. That is partly due to the fact that the study of law occupied a very important position in the lives of the educated Romans. No wonder, many of the greatest minds of the age were attracted to the study of law and consequently the prestige of jurisprudence was very high. The writers of text-books on law moulded and educated public opinion and pointed out the changes and developments which seemed desirable to them. Each text-book on law enjoyed an almost binding authority. However, its importance depended upon the reputation of the author. The writings of jurists like Gaius, Ulpian, Paul, Papinian and Modestinus enjoyed almost statutory authority. According to the Law of Citations of 426 A. D., the opinions of the above five jurists were to be considered as binding in any law suit. If the authorities differed, the opinion of the majority was to be followed. Where the numbers on each side were equal, that side was to prevail which had the support of Papinian. If Papinian was silent on any point and the other authorities were equally divided, the judge was free to make his own choice.

In medieval and modern Europe, the writings of great jurists proved a very important source of law. They actually decided what system of law should prevail in a particular country. In Italy, the labours of the Glossators and the commentators created the Pandect law which ultimately triumphed in that country. The German civilians brought the Pandect law to Germany.

A large number of English jurists expounded and influenced law in their own way. Bracton was the earliest English jurist whose name can be mentioned in this connection. The same was the case with the writings of Littleton, Fitzherbert, Coke, Blackstone, Dicey, Anson and Chitty. The same was the case with Justice Story in the U. S. A. Blackstone combined the functions of a judge, a text-book writer and a university professor. According to Dr. Jenks: "It is sometimes said that, even so late as the period now under discussion, the text-books of certain very

eminent writers have been treated as authorities by English courts, and should therefore be regarded as sources of modern English law. But this is true only in a modified sense. Doubtless such works as Blackstone's *Commentaries*, Dalton's *County Justice*, and Hawkin's *Pleas of the Crown*, may be fairly treated by the historian as statements, *prima facie* correct, of the law at the time when they were written. It may even be that, having regard to the great reputation of such writers, English judges will allow advocates to quote from them, and will even themselves, in delivering judgments, allude with respect and approval to those works. But it cannot be seriously contended that these works are authorities in the sense in which Bracton, Littleton, and even Coke, are authorities for the law of their respective periods. The difference between the weightiest passage of modern text-book writer and the most ordinary judgment of a Court of First Instance, or an unimportant section of an Act of Parliament, is quite clear. The advocate may show that the passage in question is inconsistent with statute or judicial decision; and, if he succeeds, its so-called 'authority' is at once gone. He may attempt to show the unwisdom, absurdity, or inconsistency of the judicial decision or the section of the Act of Parliament; but, until these have been overruled by a later statute, or (in the case of the judicial decision) by a superior tribunal, they remain binding in *pari materia*, and even if the advocate is not pulled up for irrelevance, his argument will be of no avail. Even Blackstone, one of the greatest text-book writers, admits freely the truth of this view. 'Text-book writers, whatever they once were, are now guides only, and not authorities for English law.'

According to Keeton: "The conservatism of English law in refusing to admit the authority of a text-book writer until his works have adequately satisfied the test of time is justified when we remember that the writer is essentially a theorist, rather than a practising lawyer, at the time of writing, and in consequence he is subject to certain influences arising out of that situation. In the first place, he is apt to state his rules too broadly. He is always eager to discover general principles and tendencies underlying his science; the modern literature of Roman law, especially, contains works written purely from the standpoint of some particular theory, and the evidence has been 'interpreted', twisted, and even forgotten



altogether, in order to preserve that theory. Again, a text-book writer has not the same responsibility as a judge, whose decisions, in the form of reasoned judgments, are composed with an actual case before him, reminding him of the fact that the rights of definite individuals will be affected by his decisions, and further, that his decisions form a link in a chain of precedents vitally affecting human existence in that particular community, in general. This gives judicial decisions a more cautious character than the writings of jurists. Indeed, largely on account of their remoteness from the general trend of human affairs, there have been jurists advocating the direct penalties and the most severe constructions of the laws of some systems when they themselves were among the most peaceful and benevolent of mankind in their personal relations. The doctrines of ruthlessness, based on State necessity, put forward by some writers upon international law during the nineteenth century and the opening years of the twentieth gave some colour of legal justification to the perpetration of some of the most reprehensible acts of recent warfare."

According to Paton, the text-book writer attempts to universalize, to reduce to an ordered unity and to discover the deeper principles that underlie particular decisions. However, he has a much narrower creative function than a judge as he holds no official position. According to Pomponious, legal reforms cannot be brought about without the help of experts in common law. Law is like a complicated machine and it can be improved only by those who are cognizant of its mechanism.

According to Holdsworth: "No doubt the practice of conveyancers is not law in the same sense as a statute or judgment is law, and if it is founded on an erroneous view of the law it will be disregarded. But provided that it is unanimous and provided that it is not contrary to an ascertained rule of law, it will be such cogent evidence of the law that it will rarely be disregarded by the courts."

"For the exposition of our very complicated real property law", says Byrne, J., "it is proper in the absence of judicial authority to resort to text-books which have been recognized by the courts as representing the views and practice of conveyancers of repute", and he proceeds to make reference, among other works,

to *Challis on Real Property*—a book which has been constantly cited with approval in the Chancery Division. Nor in this principle confined to any particular jurisdiction. In a very different branch of the law—Admiralty—we find Lord Atkin paying the following compliment to extra-judicial doctrine: “This is one of those cases dealing with damages which in my experience I have found to be a branch of law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider. I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book on the subject.”

In *Bastin v. Davies*, (1950) 2 KB 579, Lord Goddard, C. J. said that “*this court would never hesitate to disagree with a statement in a text-book, however authoritative or however long it had existed, if it thought right to do so*”, but he added: “It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known text-book for a great number of years without being judicially doubted and after it had been acted on by justices and their clerks for many years.”

Lord Denning wrote the following about the third edition of Winfield's *Text-book on the Law of Tort*: “The reason why such books are so useful in the courts is that they are not digests of cases but repositories of principles. They are written by men who have studied the law as a science with more detachment than is possible to men engaged in busy practice. The influence of the academic lawyers is greater now than it has ever been, and is greater than they themselves realize. Their influence is largely through their writings. The notion that their works are not of authority except after the author's death has long been exploded. Indeed, the more recent the work, the more persuasive it is, especially when it is a work of such an authority as Professor Winfield: because it considers and takes into account modern developments in case law and current literature. Winfield is now cited in place of Pollock; and Cheshire and Fifoot in place of Anson. The essays of Professor Goodhart have had a decisive influence in many important decisions. The vast tomes written and edited by practitioners for practitioners fulfil a different purpose. They are valuable as works of reference. They are cited not for principles but for detailed rules on special subjects.

They are most important in day-to-day practice, but do not compare with books such as Winfield when it comes to fundamental principles."

## Religion

Religion is also a source of law. According to Sir Henry Maine and Sir James Frazer, the religious fear of evil was the principal instrument in securing uniformity of conduct in primitive society at a time when law did not enjoy an independent existence. The Jews regarded their laws as divine in origin and the same is the case with the Hindus and Mohammadans. In the case of Roman law, *Jus* was at first inextricably mixed up with *Fas* and for a time, the pontiffs administered both. The law of western Europe would have been different in form and content if there had been no Christianity. It was Christianity which preserved the substance of Roman law.

According to Sir Henry Maine, the origin of law in Greece was the Themistes or the divinely inspired judgments of the priest judges. Religion also enriched the law of England. The Chancellors of England who were responsible for the growth of equity, were guided by their conscience. In the case of *Cowan v. Milbourne*, it was held that "Christianity is part of the law of England". This view was set aside in 1917 in the case entitled *Bowman v. Secular Society*, but in spite of this, to ridicule the tenets of Christianity is blasphemy under the English law.

## Agreement

According to Sir John Salmond, an agreement is also a source of law as it gives rise to conventional law. To quote him: "That an agreement operates as a source of rights is a fact too familiar to require illustration." If *X* and *Y* enter into an agreement which is a lawful one, the courts of law recognise that agreement and enforce the same on *X* and *Y*. The same is the case if *A* and *B* enter into an agreement with a lawful purpose. However, such agreements bind only the parties to the agreement and not others. Law is a rule of conduct and generality is the test of law. There is no generality in an agreement between two parties. An agreement is recognised so long as it exists, and when it is dissolved, it has no further effect. Agreements play an important part in

international law. There may be an agreement among a large number of States to follow a particular procedure with regard to a certain matter. The States entering into the agreement are bound by that. If the agreement is continued for a long time by a large number of States, it acquires the force of a custom and custom thus born is a source of international law. According to Keeton. "Custom is a source of international law, but agreement never is so; agreement is merely a source of custom and only then if a number of other agreements exist compelling uniformity of conduct in the States who are parties to them. The process of municipal law is exactly the same. A number of agreements concluded in the same way and enforcing similar courses of conduct on the parties to them may cause a custom to grow. But it is the custom and not the agreement which is always the source of law."

#### SUGGESTED READINGS

- |                 |  |
|-----------------|--|
| Amos and Walton | : <i>Introduction to French Law.</i>       |
| Dias and Hughes | : <i>Jurisprudence.</i>                    |
| Levi, E.H.      | : <i>Introduction to Legal Reasoning.</i>  |
| Levy—Ullmann    | : <i>The English Legal Tradition.</i>      |
| Paton           | : <i>Jurisprudence.</i>                    |
| Pound, R.       | : <i>The Formative Era of American Law</i> |
| Salmond         | : <i>Jurisprudence.</i>                    |
| Stone           | : <i>The Province and Function of Law.</i> |

### XIII

## LEGAL RIGHTS AND DUTIES

The terms 'wrong' and 'duty' are closely connected with rights and it is desirable to refer to them before discussing the important subject of legal rights

### Legal Wrong

According to Salmond: "A wrong is simply a wrong act—an act contrary to the rule of right and justice. A synonym of it is injury, in its true and primary sense of *injuria* (that which is contrary to *jus*), though by a modern perversion of meaning this term has acquired the secondary sense of harm or damage whether rightful or wrongful and whether inflicted by human agency or not."

According to Pollock: "Wrong is in morals the contrary of right. Right action is that which moral rules prescribe or commend, wrong action is that which they forbid. For legal purposes anything is wrong which is forbidden by law; there is wrong done whenever a legal duty is broken. *A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability.* Hence the existence of duty, as it involves right, involves also the possibility of wrong; logically no more than the possibility, though we know too well that all rules are in fact sometimes broken. Duty, right and wrong are not separate or divisible heads of legal rules or of their subject-matter, but different legal aspects of the same rules and events. There may be duties and rights without any wrong; this happens whenever legal duties are justly and truly fulfilled. There cannot, of course, be a wrong without a duty already existing, but wrongs also create new duties and liabilities. Strictly speaking, therefore, there can be no such thing as a distinct law of wrongs. By the law of wrongs we can mean only the law of duties, or some class of duties, considered as exposed to infraction, and the special rules for

awarding redress or punishment which come into play when infraction has taken place. There is not one law of rights or duties and another law of wrongs. Nevertheless there are some kinds of duties which are more conspicuous in the breach than in the observance. The natural end of a positive duty is performance. A thing has to be done, and when it is duly done the duty is, as we say, discharged; the man who was lawfully bound is lawfully free. We contemplate performance, not breach. Appointments to officers are made, or ought to be, in the expectation that the persons appointed will adequately fulfil their official duties." (*Jurisprudence and Legal Essays*, pp. 37-38).

Wrongs are of two kinds, *legal* and *moral*. The essence of a legal wrong is that it is a violation of justice according to the law—not the manner in which the guilty are treated. It is a legal wrong if a debt is not paid within the period of limitation. A moral wrong is an act which is morally or naturally wrong. It is contrary to the rule of natural justice. It is a moral wrong to disobey one's parents. A legal wrong need not be a moral wrong and *vice versa*.

## Duty

According to Salmond: "A duty is an obligatory act, that is to say, it is an act opposite of which would be a wrong. Duties and wrongs are correlatives. The commission of a wrong is the breach of a duty and the performance of a duty is the avoidance of wrong."

Duties are of two kinds, *legal* and *moral*. A legal duty is an act the opposite of which is a legal wrong. It is an act recognized as a duty by law and treated as such for the administration of justice. A moral or natural duty is an act the opposite of which is a moral or natural wrong. A duty may be moral but not legal, or legal but not moral, or both at once. In the case of England, there is a legal duty not to sell or have for sale adulterated milk knowingly. There is no legal duty in England to refrain from offensive curiosity about one's neighbours even if its satisfaction does them harm. There is a moral duty but not a legal duty. There is both a legal and moral duty not to steal.

Duties may be positive or negative. When the law obliges us to do an act, the duty is called positive. When the law obliges us to forbear from doing an act, the duty is negative. If *R* has a right to a land, there is a corresponding duty on persons generally not to interfere with his exclusive use of the land. Such a duty is a negative duty. It is extinguished only if the right itself is extinguished. If *S* owes a sum of money to *T*, the latter is under a duty to pay the amount due. This is a positive duty. In the case of positive duties, the performance of the duty extinguishes both duty and right but a negative duty can never be extinguished by fulfilment.

Duties can also be primary and secondary. Primary duties are those which exist *per se* and independently of any other duty. An example of a primary duty is to forbear from causing personal injury to another. A secondary duty is that which has no independent existence but exists only for the enforcement of other duties. An example of a secondary duty is the duty to pay a man damages for the injury already done to his person. It is also called a remedial, restitutory or sanctioning duty.

According to Salmond, if a law recognizes an act as a duty, it generally enforces its performance and punishes those who disregard the same. According to Keeton, a duty is an act or forbearance compelled by the State in respect of a right vested in another and the breach of which is a wrong. According to Hibbert, duties are imposed on persons and require acts and forbearances which are their object. Hibbert refers to absolute and relative duties. Absolute duties are owed only to the State. The breach of an absolute duty is generally a crime and the remedy is the punishment of the offender and not the payment of any compensation to the injured party. Relative duties are owed to a person other than the one imposing them. The breach of a relative duty is called a civil injury and its remedy is compensation or restitution to the injured party.

According to Austin, some duties are absolute. Those duties do not have a corresponding right. Examples of absolute duties are self-regarding duties such as a duty not to commit suicide or become intoxicated, a duty to indeterminate persons or the public such as a duty not to commit a nuisance, a duty to one not a

human being such as a duty towards God or animals and a duty to sovereign or State.

If we examine these four classes of duties critically, they are reduced to one category and that is the duties to the State. A duty not to commit suicide or nuisance is enforced by the State and can be included in the category of duties to the State. The result is that the corresponding right vests in the State. However, the view of Austin is that "a sovereign government in its collegiate or sovereign capacity has no legal rights against its own subjects" and therefore the duties towards the State are absolute duties. Dr. Allen, Markby and Hibbert support Austin. Allen writes: The State, no doubt, may have definite rights—interests in the strict sense, similar to those of the individual citizens—rights of a very different kind from the 'right to punish' or 'right to command' or the 'right of sovereignty'. It may enter into contracts and other relationships which give birth to rights and duties in the ordinary legal sense." Where the State imposes duties by virtue of its sovereign character, Allen denies that there are correlative rights in the State. To quote him: "A State, for example, compels children to go to school, or to be vaccinated, prohibits the sale of certain drugs or alcoholic liquors, or forbids the importation of animals which have not first been quarantined." In such cases, the State has no corresponding right. Particularly, the duties enforced by criminal law are absolute duties. According to Hibbert: "The distinction between absolute and relative duties is logical and convenient since it harmonises with the distinction between might and right."

The view of Austin is criticised by Gray, Pollock and Salmond. According to Salmond: "There can be no duty without a right any more than there can be a husband without a wife or a parent without a child." The result is that rights and duties are always correlated and there is absolutely no scope for absolute duties. The view of Pollock is that "there seems to be no valid reason against ascribing rights to the State in all cases where its officers are enjoined or authorised to take steps for causing the law to be observed and breakers of the law to be punished."

### **Definition of Legal Rights**

Many definitions of rights have been given by various writers



and reference may be made to some of them. According to Hibbert, a right is "one person's capacity of obliging others to do or forbear by means not of his own strength but by the strength of a third party. If such third party is God, the right is Divine. If such third party is the public generally acting through opinion, the right is moral. If such third party is the State acting directly or indirectly, the right is legal."

According to Gray, a legal right is "that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons". According to Salmond "A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong." A legal right must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by law inasmuch as cruelty to animals is a criminal offence. But beasts are not for that reason possessed of legal rights. The only interest and the only right which the law recognizes in such a case is the interest and right of society as a whole in the welfare of the animals belonging to it. He who ill-treats a child violates a duty which he owes to the child and a right which is invested in him. But he who ill-treats a dog breaks no *vinculum juris* between him and it, though he disregards the obligations of humane conduct which he owes to the society or the State and the co-relative right which society or State possesses.

According to Vinogradoff: "We can hardly define a right better than by saying that it is the range of action assigned to a particular will within the social order established by law. A right, therefore, supposes a potential exercise of power in regard to things or persons. It enables the subject endowed with it to bring with the approval of organized society, certain things or persons within the sphere of action of his will. When a man claims something as his right, he claims it as his own or as due to him."

According to Holland, a right is "a capacity residing in one man of controlling, with the assent and the assistance of the State, the actions of others". Again, "that which gives validity to a

legal right is, in every case, the force which is lent to it by the State. Anything else may be the occasion but is not the cause of its obligatory character. Sometimes it has reference to a tangible object. Sometimes it has no such reference. Thus on the one hand, the ownership of the land is power residing in the landowner, as its subject, exercised over the land, as its object, and available against all other men. So a father has a certain power, residing in himself as its subject and exercised over his child as its object, available against all the world besides. On the other hand, a servant has a power residing in himself as its subject, over no tangible object, and available only against his master to compel the payment of such wages as may be due to him."

Holland explains the conception of legal rights by contrasting them with might and moral rights in these words: "If a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'might' so to carry out his wishes."

"If, irrespective of having or not having this might, public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his doing, then he has a 'moral right' so to carry out his wishes."

"If, irrespective of his having or not having, either the might or moral right on his side, the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes."

If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of the public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the State to exert its force on his behalf. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the State. The

whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, Law exists, as we stated previously, for the definition and protection of rights.

According to Justice Holmes, a legal right is "nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force". Legal right is the power of removing or enforcing legal limitations on conduct.

According to Martin: "It is said that he had a right to go along the path across which the machinery was erected, for he was a workman employed in the dockyard and had liberty to use the water closet. But that is a fallacious argument. It is true that the plaintiff had permission to use the path. Permission involves leave and licence, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a licence, not of a right. It is an abuse of language to call it a right."

According to Pollock: "Right is freedom allowed and power conferred by law." According to Kirchmann, a right is "a physical power which through the commands of authority not only is morally strengthened but also can protect against a transgressor by the application of compulsion or evil". According to Buckland, a legal right is an interest or an expectation guaranteed by law. According to T. H. Green: "Rights are powers which it is for general well-being that the individual should possess." According to Kant, a right is "the authority to compel." According to K. R. R. Shastri: "A right may be defined as an interest recognized and protected or guaranteed by the State since it is conducive to social well-being."

According to Austin, law is a general command of the sovereign and duty is the liability to incur the evil of its sanction in case of non-compliance with the command. A person in whose favour or to whose benefits the command enures is said to be invested with a right. A person has a right if he can exact from another acts or forbearances. "A party has a right when another or others are bound or obliged by the law to do or forbear towards or in respect of him." This definition does not make any reference to the element of interest involved in the conception of right. Mill

pointed out that a prisoner may be said to have a right to be imprisoned because the jailor is bound by law to imprison him. To be imprisoned is no right. It is only a disability imposed by the sanction of law.

According to Austin, liberty is illusory if it is not protected by law and if law protects it, it amounts to a right. The difference between a right and liberty lies only in the emphasis laid on particular elements in the conception. In liberty, prominence is given to the absence of legal restraint and protection is secondary, but in the case of right it is just the other way. Right denotes protection and the absence of restraint. However, the same elements are comprised in both. For this reason, Austin came to the conclusion that rights and liberties were essentially the same. However, critics point out that Austin ignored the element of interest involved in liberty. What the law protects in liberty is not the interest involved in it but only the exercise of liberty. Rights and liberties are essentially different. Rights pertain to the sphere of obligations and liberties pertain to the sphere of free will. Rights refer to those things which others ought to do for me and liberties refer to those things which I may do for myself.

### Theories about Legal Rights

There are many theories with regard to the nature of legal rights.

(1) Austin, Holland, Pollock, Vinogradoff and others are the exponents of the *will theory*. According to this theory, a right is an inherent attribute of the human will. The subject-matter of a right is derived from the exercise of a human will. The will theory was inspired and extended by the doctrine of natural rights. It is the function of law to confer certain powers or allow certain freedom to individuals in the form of legal rights. A legal right is a power conferred by law. According to Justice Holmes, a legal right is "nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force". Again, "legal right is the power of removing or enforcing legal limitations on conduct". According to Puchta, a legal right is a power over an object which by means of this right can be subjected to the will of the person enjoying the right. Accord-

ing to Holland, a legal right is "the capacity residing in one man of controlling with the assent and assistance of the State, the actions of others".

(2) Another theory is known as the *interest theory of rights*. Ihering is the greatest advocate of this theory and many English and American writers have followed him. According to Ihering: "A legal right is a legally protected interest." Ihering does not put stress on the element of will in a legal right. On the other hand, he puts emphasis on the material element of interest. The basis of right is not will but interest. According to Buckland, a legal right is "an interest or an expectation granted by law". According to Salmond, a legal right is "an interest recognised and directed by a rule of right". Paton defines a legal right in terms of recognition and protection by the legal order. According to him, although enforceability by legal process is said to be a necessary condition of a legal right, yet there are three qualifications to the above statement. Law does not always enforce a right and the injured party is guaranteed merely damages. There are certain imperfect rights which are recognised by law only partially. A time-barred debt cannot be realised through the agency of courts as it is an imperfect right, but if the creditor comes to have the money in some way, he can adjust the same towards the debt and need not return the same. Likewise, a time-barred debt may be revived if the debtor acknowledges the same. In certain cases, the courts of justice do not have an adequate machinery to enforce their decisions. This is particularly so in the case of international law.

Allen tries to bring about a reconciliation between the will theory and the interest theory. According to him, the essence of a legal right seems to be not legally guaranteed power by itself nor legally protected interest by itself, but the legally guaranteed power to realise an interest. A similar attempt at reconciliation is made by Jellinek also. According to him, a right is the will power of man applied to a utility or interest recognised and protected by a legal system. The human will does not operate in a vacuum and interests are the objects of human desire. An interest is a formal expression of the will of an individual or a group of individuals. A correct theory of legal rights must take into consideration both the elements of will and interest.

(3) According to Duguit, will is not an essential element in law or right. The real basis of law is social solidarity. The emphasis on will is anti-social as it shows that man is in conflict with his fellow-beings. Duguit rejects altogether the conception of legal rights. There is no conflict of interests between society and the individuals. The theory of subjective rights is merely "a metaphysical abstraction". To quote him: "The right of the individual as a pure hypothesis, a metaphysical affirmation, is not a reality. It implies a social contract at the origin of society, a manifest contradiction. No one has any other right than always to do his duty." Duguit goes to the extent of saying that the term 'right' should be removed from legal vocabulary.

The theory of Duguit has been criticized from many quarters. According to Dr. Jenks: "If one individual can in the name of the law and by the agency of the State's officials bring down upon another who has committed a breach of a legal duty, the sanction attached to that duty, there exists in the first individual a power to enforce, with the aid of the State, a legal duty and to that power the jurist gives the name of legal right." According to Laski, the denial of legal rights by Duguit is "terminological rather than actual".

(4) According to the totalitarians, the whole concept of legal rights is wrong. The only real thing is the State and not much importance should be attached to the individuals. The State is omnipotent and all-embracing and individual has no existence independent of the State. All rights belong to the State and the individual as such can claim nothing.

### **Essentials of a Legal Right**

According to Salmond, every legal right has five essential elements:

(1) The first essential element is that there must be a person who is the owner of the right. He is the subject of the legal right. He is sometimes described as the person of inherence. The owner of a right need not be a determinate or fixed person. If an individual owes a duty towards society at large, an indeterminate body is the subject of inherence. In the case of a bequest to an unborn person, the owner of the right is an unborn child who is an unascertained person.

(ii) A legal right accrues against another person or persons who are under a corresponding duty to respect that right. Such a person is called the person of incidence or the subject of the duty. If *A* has a particular right against *B*, *A* is the person of inherence and *B* the subject of incidence.

(iii) Another essential element of a legal right is its content or substance. It may be an act which the subject of incidence is bound to do or it may be a forbearance on his part.

(iv) Another essential element is the object of the right. This is the thing over which the right is exercised. This may also be called the subject-matter of the right.

(v) Another essential element of a legal right is the title to the right. Facts must show how the right vested in the owner of the right. That may be by purchase, gift, inheritance, assignment, prescription, etc.

A man buys a house from another. The buyer will be the person of inherence and the seller and the other persons generally the persons of incidence. The subject-matter of the right will be the house. The contents of the right would lie in the fact that the seller and every other person should not disturb the peaceful possession and enjoyment of the house by the buyer. The title to the right is to be found in the fact of the sale of the house.

When a person purchases anything by paying the price for it, he is entitled to the undisputed right of use in the thing purchased by him. Other persons are bound by the co-relative duty. The owner has a right against all the world. The object or subject-matter of the right in the thing purchased is his legal right. He acquires the title of the right because the property in the object has been conveyed to him in the same manner as it was acquired by the former owner. Every right involves a threefold relation in which its owner stands. It is a right against some person or persons. It is a right to some act or omission of such person or persons. It is a right over or to something which that act or omission relates. Every right involves a relation with its owner. An ownerless right is not recognised by law, although it is not a legal impossibility. Although ownerless rights are not recognised, the ownership of a right may be uncertain or contingent. Such an owner may be an indeterminate person. He may

be an unborn person. He may perhaps never be born. Although every right has an owner, it need not have any certain or vested owner.

An object is as essential an element in the idea of right as the subject to whom the right belongs. A right being a legally protected interest, the object of the right is the thing in which the owner has his interest which he desires to keep or to obtain and which he is able to keep or obtain by means of the duty which the law imposes on other persons. As regards rights over material things, all civilized societies have a great mass of legal rules which are the most important legal rights.

There are rights in respect of one's own person. Every person has a right not to be killed. The object of that right is his own life. One has a right not to be physically injured or assaulted. He has a right not to be coerced or deceived into acting contrary to his desires and interests. Likewise, one has a right to reputation, rights in respect of domestic relations, rights over immaterial property, rights to services etc. As regards the right of personal service, the law which recognises slavery makes it perfectly legal for another to buy and sell a human being in the same manner as he buys a horse or a steam engine. Where slavery is not recognised, the only right one can acquire over a human being is the temporary and limited right to the use of that person created by a voluntary agreement with that person. Such an agreement does not create a permanent and general right of ownership over the person.

### **Parties to a Legal Right**

According to Austin, there are three parties to a legal right. The first party is the State or the sovereign which confers legal rights on certain individuals and which imposes corresponding duties on others. The second party is the person or persons on whom the right is conferred. The third party is the person or persons on whom the duty is imposed or to whom the law is set or directed.

### **Enforcement of Legal Rights**

There are many methods of enforcing legal rights. If a party has suffered, the usual method is to award damages in civil cases.



If it is found that damages are not an adequate remedy, an order can be made for the restitution of the thing itself. This is particularly so in the case of rare articles. In certain cases the court orders the specific performance of the contract itself. Sometimes, penalty is imposed in certain cases. The injured party is given the power to recover an amount which is more than the loss suffered. Sometimes, a legal right can be enforced by means of an injunction. When an injunction is issued, it is the duty of the person concerned to abstain from doing an act or contravening an act.

### **Extinction of Rights**

There are many methods by which legal rights can be extinguished. Right is extinguished if the other party performs its duty. If there is a conflict for the payment of debt and the same is paid by the debtor, the legal right is extinguished. Certain rights may be waived by the agreement of the parties. Sometimes, a legal right becomes extinguished when it becomes impossible to perform the same. A person contracts to render personal service to another. The legal right to personal service is extinguished if the promisor dies. A right may be extinguished by the operation of law. A right in land may be extinguished if a law is passed by which Zamindaries are abolished. Likewise, a right is extinguished if the debt becomes time-barred. Law helps the vigilant and not the dormant. If a person does not bother about his rights, no court of law is going to help him. A right acquired by fraud or undue influence may be extinguished if the other party takes action at the right time.

### **Relation between legal right and legal liberty**

Liberty or privilege denotes the absence of restraint. It is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act.

The view of Austin is that "liberty and right are synonymous. The liberty of acting according to one's will would be illusory if it were not protected from obstruction". When law affords such protection, it is in fact conferring a right and so liberty and right are synonymous. In liberty, the prominent idea is the absence of restraint while protection for the enjoyment of

that liberty is the secondary idea. Right denotes the protection and connotes the absence of restraint.

It is true that liberty and rights are alike benefits conferred upon a person by law. However, there is a vital distinction between the two. Austin's statement that liberty and right are synonymous is not correct. The term "liberty" implies that the law does not forbid a person from doing an act and arises out of the absence of duties imposed upon him. The term "right" implies that the law enjoins on another the duty of doing or forbearing from doing something for the benefit of the person entitled to the right.

Salmond writes: "Rights are what others are to do for me, liberties are what I may do for myself." I am at liberty to carry on business as a shopkeeper. The law does not in consequence impose on another any duty in this respect. Therefore, I cannot complain if another person opens a rival business next door to me. I have not merely the liberty but the right of using my trade mark. If my rival sells goods with a trade mark in which I have proprietary rights, I have a legal remedy as he has infringed my right to the trade mark.

There is no suitable word to express the co-relative of liberty. As the co-relative of liberty would be the jural contradictory of right, Hohfeld has suggested that the word "no right" may be used as the co-relative of liberty.

### **Right and Power**

A power "is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act". When I speak of a testamentary power, it means that I have the ability to make a will and thereby dispose of my property. A power of appointment enables a person to dispose of the property of another for his own benefit or that of others. A pledger's power of sale or the power of re-entry on the land by a landlord when the lessee defaults in payment of rent are examples of legal powers. In the case of power, there is no correlative duty imposed on another. In this respect, power differs from right and resembles liberty. The distinction between liberty and power consists in the fact that liberty is what one may do inno-

cently without committing a wrong while power is what one may do effectively and validly.

### **Powers and Immunity**

Exemption from the power of another is an immunity. The correlative of immunity is disability. A foreign sovereign enjoys immunity from legal proceedings in our courts. We cannot institute legal proceedings against a foreign sovereign. Immunity stands to power in much the same relation as liberty is to right. Liberty arises from the absence of a right in another and the absence of a duty in oneself. Immunity arises from the absence of a power in another and the absence of liability in oneself. (See also Hohfeld's *Scheme of Jural Relations*).

### **Relation between Rights and Duties**

It is a debatable question whether rights and duties are necessarily co-relative. According to one view, every right has a corresponding duty. Therefore, there can be no duty unless there is someone to whom it is due. There can be no right without a corresponding duty or a duty without a corresponding right, just as there cannot be a husband without a wife, or a father without a child. Every duty is a duty towards some person or persons in whom a corresponding right is vested. Likewise, every right is a right against some person or persons upon whom a co-relative duty is imposed. Every right or duty involves a *vinculum juris* or a bond of legal obligation by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due. Likewise, there can be no right unless there is someone from whom it is claimed.

According to Holland, every right implies the active or passive forbearance by others of the wishes of the party having the right. The forbearance on the part of others is called a duty. A moral duty is that which is demanded by the public opinion of society and a legal duty is that which is enforced by the power of the State.

According to Keeton, a duty is an act of forbearance which is enforced by the State in respect of a right vested in another and the breach of which is a wrong. Every right implies a co-relative duty and *vice versa*.

Paton writes : "We cannot have a right without a corresponding duty or a duty without a corresponding right. When we speak of a right, we really refer to a right-duty relationship between two persons and to suppose that one can exist without the other is just as meaningless as to suppose that a relationship can exist between father and son unless both father and son have existed."

The view of Salmond is that rights and duties are co-relative. If there are duties towards the public, there are rights as well. There can be no duty unless there is some person to whom that duty is due. Every right or duty involves a bond of obligation.

In *Minerva Mills Ltd. v. Union of India*, the Supreme Court observed : There may be a rule which imposes an obligation on an individual or authority, and yet it may not be enforceable in a court of law, and therefore not give rise to a corresponding enforceable right in another person. But it would still be a legal rule because it prescribes a norm of conduct to be followed by such individual or authority. The law may provide a mechanism for enforcement of this obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of, the mechanism of enforcement. A rule imposing an obligation would not therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite any problem relating to its enforcement." [(1980) 3 SCC 625].

The other school is represented by Austin. According to him, duties are of two kinds : absolute duties and relative duties. Relative duty corresponds to a right. It is a duty to be fulfilled towards a determinate superior. All absolute duties are enforced criminally. They do not correspond with rights in the sovereign. There is an absolute duty in certain cases. Those are duties not regarding persons e.g., those owed to God and lower animals, duties owed to persons indefinitely, e.g., towards the community, self-regarding duties and duties owed to the sovereign. In case of an absolute duty, it is commanded that an act shall be done or forbidden towards or in respect of the party to whom the command is directed.

Duties towards the public at large or towards indetermined

portions of the public have no co-relative rights. The duty to refrain from committing a public nuisance has no co-relative rights. Where trustees held property on trust for religious purposes, even though there is no ascertained beneficiary, the trustees are under a duty not to use the property for a purpose other than religious purpose. The question is to whom the duty is due.

According to Austin, every right implies a corresponding duty, but every duty does not imply a corresponding right. A right to a debt implies a corresponding duty to pay the amount of the debt to the creditor. However, every duty does not imply a corresponding right. It is the duty of a magistrate to punish an offender if his guilt is proved in the court, but it cannot be said that the offender has a corresponding right to be punished.

According to Professor Hibbert "The distinction between absolute and relative duties is logical and convenient, since it harmonises the distinction between might and right, for the State can only redress infringement of absolute duties by its own might, whereas persons invested with legal rights do not redress infringement by their own might but by appealing to the sovereign for protection of their rights which is quite a different method of redress."

Critics point out that the absolute duties enumerated by Austin are not duties in the legal sense. If they are duties at all, they are not absolute. The duty towards God is not a legal duty if it is not embodied in some statute. If it is embodied in a statute, it is a duty towards the State and not towards God. Certain duties imposed on individuals towards animals are in essence the duties towards the State or the owner of the animal and not towards the animal itself. By duties towards persons indefinitely, Austin perhaps means duties towards the community in general. The general duty towards the community is nothing more than a bundle of duties towards each particular individual of the community and each individual has got a co-relative right. Self-regarding duties are also duties towards the State because it is a part of the criminal law as an attempt to commit suicide.

According to Austin, the right-duty relationship between two individuals can exist only where there is a political superior to protect and enforce it. Without the political superior, there can

be no right-duty relationship. If we regard the relationship between the State and the individual as the right-duty relationship, where is the political superior? In recognising any other political superior, Austin's definition of the sovereign would be exploded. The sovereign has the power to change the law at any time. Therefore, the relationship between the State and the citizen cannot be termed as right-duty relationship. The sovereign commands and the duty of the citizen is to obey. This power of the State cannot be called a co-relative legal duty against the citizen.

It is submitted that the view of Austin is not correct. It is true that the relationship between the State and the citizen is not on the same footing as the relationship between a citizen and a citizen. It depends more on the nature of the State than on anything else. In democratic countries, a citizen has rights against the State. This is the condition under the Indian Constitution. A co-relative duty binds the State and the State is bound until it changes the law. Likewise, the State has rights against citizens. It is clear that Austin's theory is not correct in modern times.

### **Ownerless Rights**

There is no unanimity of opinion as to whether every right must have an object or not. According to Salmond, an ownerless right is an impossibility. There cannot be a right "without a subject in whom it inheres any more than there can be weight without a heavy body; for rights are merely attributes of persons and can have no independent existence". The object of law is to protect a person in the exercise and enjoyment of a particular right and not to protect a right in itself. A right cannot exist in vacuum. A right may be held of a determinate individual or by the public at large. Although every right has an owner, it need not have a vested and certain owner. The fee simple of a land may be left by will to a person who is unborn at the time of the death of the testator. The ownership of the land is contingent on the birth of the child. Sometimes, the question arises as to who is the owner of a debt in the interval between the death of the creditor intestate and the vesting of his estate in an administrator. According to Roman law, the rights contingently belong to the heir but they were for the time being vested in the inheritance by virtue of its fictitious personality. The fictitious personality was that of the

deceased and not of the future heir. Before the passing of the Judicature Act of 1873, the personal property of an intestate in the interval between death and the grant of letters of administration was deemed to be vested in the judge of the Court of Probate. Now, it vests either in President of the Probate, Divorce and Admiralty Division or in the judges of the High Court collectively.

At present, neither the Roman nor the English fiction is necessary. There is no difficulty in saying that the estate of an intestate is presently owned by a *incerta persona* or by the person who is subsequently appointed its administrator.

There are some writers who are of the opinion that there are some rights without objects. According to them, the object of a right means some material thing to which it relates. In this sense, an object is not an essential element in the conception of right. There are others who admit that a person or a material thing may be the object of a right as in the case of a husband having a right in respect of his wife or a father having a right in respect of his children. They deny that the right of reputation or personal liberty or the right of a patent or copyright has any object at all.

On the point of ownerless rights, Salmond concludes: "An object is an essential element in the idea of a right. A right without an object in respect of which it exists is as impossible as a right without a subject to whom it belongs. A right is ..... a legally protected interest; and the object of the right is the thing in which the owner has this interest."

### **Classification of Rights according to their Objects**

Salmond refers to seven kinds of rights by reference to their objects:

(1) There can be *rights over material things*. These are the most important legal rights in respect of their number and variety. Examples are my right to own my car, my land, my house, my furniture, etc.

(2) There are *rights in respect of one's own person*. I have a right not to be killed and the object of this right is my life. I have a right not to be physically injured or assaulted and the

object of this right is my bodily health and integrity Likewise, I have a right not to be coerced or deceived or imprisoned

(3) There is also the *right of reputation*. By reputation we mean the good opinion that other persons have about a person. A person has as much interest in his reputation as in the money in his pockets. A person has a right not to be libelled. Such a right has obtained legal recognition and protection.

(4) There are *rights in respect of domestic relations* Every person has an interest and a right in the society, affections and security of his wife and children No person is to be allowed to seduce his wife or daughter or take away his child or interfere with his life in any way

(5) There are *rights in respect of other rights* A right may have another right as its subject-matter. In the case of an agreement to sell land, the right transferred is a right to the right of ownership which passes only when the sale is completed By a promise of the marriage, a woman acquires a right to be married. She acquires the rights of a wife on being actually married. There are writers like Gray who distinguish between rights to rights which can be specifically enforced and rights to rights the violation of which give rise only to some lesser remedy On making a valid contract to purchase land, a right to the ownership is acquired A contract to marry only gives a right to be married or to obtain damages in case the engagement is broken This treats enforcement and not recognition as the essence of a right and on that basis only the distinction seems to be valid.

(6) There are *rights over immaterial property* and examples of such rights are patent rights, copyrights, trade-marks and commercial goodwill. The object of patent right is an invention and the patentee has a right to its exclusive use The object of literary copyright is the form of literary expression produced by the author of a book.

(7) There are *rights to services* as well. These rights are created by a contract between master and servant, physician and patient and employer and workman In these cases, the object of the right is the skill, knowledge, strength, time, *etc*, of the person bound. If a physician is hired, the hirer gets a right to the use



and benefit of his skill and knowledge. If a person hires a horse, he gets a right to the use and benefit of his strength and speed. The object of a right of personal service is the person of him who is bound to render it. The mind and body of a person constitute an instrument which is capable of certain uses just as a horse or steam-engine is.

### Legal Rights in a Wider Sense

The term 'legal right' is also used in a wider sense to include any legally recognised interest whether it corresponds to a legal duty or not. In this generic sense, a legal right may be defined as an addition or benefit which is conferred upon a person by a rule of law. Rights in this sense are of three different kinds, *viz*, rights in the strict sense, liberties and powers.

(a) As regards the *rights in the strict sense*, there are legally protected interests corresponding to legal duties imposed upon others.

(b) The *legal liberties* of a person are the benefits which he derives from the absence of legal duties imposed upon him. Those are the things which he can do without being prevented by law. A person has a right to do whatever he pleases with himself but he has no right or liberty to interfere with others. He may have a right to express his opinions on public affairs but he has no right to publish a defamatory or seditious libel. He can defend himself against violence but he cannot take the law into his own hands. In *Musgrove v. Toy*, it was held: "It is often said that all rights whatever correspond to duties; and by those who are of this opinion a different explanation is necessarily given of the class of rights which we have just considered. It is said that a legal liberty is in reality a legal right not to be interfered with by other person in the exercise of one's activities. It is alleged that the real meaning of the preposition that I have a legal right to express what opinions I please, is that other persons are under a legal duty not to prevent me from expressing them. So that, even in this case, the right is the correlative of a duty. Now there is no doubt that in most cases a legal liberty of acting is accomplished by a legal right not to be hindered in so acting. If the law allows me a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien

interference. But in such a case there are in reality two rights and not merely one, and there are instances in which liberties are not thus accompanied by protecting rights. I may have a legal liberty which involves no such duty of non-interference imposed on others. If a landowner gives me a licence to go upon his land, I have a right to do so, in the sense in which a right means a liberty; but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me. The licence has no other effect than to make that lawful which would otherwise be unlawful. The right which I so acquire is nothing more than an extension of the sphere of my rightful activity. So a trustee has a right to receive from the beneficiaries remuneration for his trouble in administering the estate, in the sense that in doing so he does no wrong. But he has no right to receive remuneration in the sense that the beneficiaries are under any duty to give it to him. So an alien has a right, in the sense of liberty, to enter British dominions, but the executive government has an equal right, in the same sense, to keep him out. That I have a right to destroy my property does not mean that it is wrong for other persons to prevent me; it means that it is not wrong for me so to deal with that which is my own. That I have no right to commit theft does not mean that other persons may lawfully prevent me from committing such a crime, but that I myself act illegally in taking property which is not mine."

(c) According to Salmond, a *power* is an ability conferred upon a person by law to determine, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either all by himself or by other persons. According to Halsbury "A power is an authority reserved by or limited to a person to deal with or dispose of either wholly or partially, real or personal property, either for his own benefit or that of others." According to Paton. "A power is an ability on the part of a person to produce a change in a given relation by doing or not doing an act." Examples of powers are the right to make a will, the right to alienate property, the power of sale vested in a mortgagee, the right of re-entry on the part of a landlord, the right to cancel a contract on the ground of fraud, etc. These rights have no

corresponding duties. The right to make a will does not involve any duty on the part of somebody else. The right of a mortgagee to sell the mortgaged property does not impose any duty upon the mortgagor.

Powers are of two kinds : public and private. Public powers are those which are vested in a person as an agent or instrument of the functions of the State. They comprise the various forms of legislative, executive and judicial authority. Private powers are those which are vested in persons to be exercised for their own purposes and not as agents of the State.

According to Salmond : "A liberty is that which I may do innocently ; a power is that which I can do effectively ; a right in the narrow sense is that which other persons ought to do on my behalf. I use my liberties with the acquiescence of the law. I use my power with its active assistance in making itself an instrument of my will ; I enjoy my rights through the control exercised by it over the acts of others on my behalf."

### Kinds of Legal Burdens

According to Salmond, legal burdens are of three kinds, viz , duties, disabilities and liabilities. A duty is the absence of liberty. A disability is the absence of power. A *liability* is the presence either of liberty or of power vested in someone else as against the person liable. An example of a liability is the liability of a trespasser to be ejected forcibly. Likewise, the goods of a defaulting tenant can be seized for rent. There is a liability of a mortgagor to have the property sold by the mortgagee. There is a liability of a judgment-debtor to have execution issued against him. There is a liability of the unfaithful wife to be divorced. The most important form of liability is that which corresponds to the various powers of action and prosecution arising from the different forms of wrongdoing.

A *disability* is the mere absence of capacity of powers and can be called "no-power". According to the Indian Penal Code, a child below seven years of age is immune from a criminal trial and the courts are under a disability to try him. Likewise, a minor is under a disability to enter into a contract or make a will.

According to Paton: "An immunity is a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person." Just as a power is a legal ability to change legal relations, likewise an immunity is an exemption from having a given legal relation changed by another. A judge is immune from being punished for whatever he says during the course of the trial. The right of a peer to be tried by peers is an immunity from the power of the ordinary criminal courts. It is neither a right in the strict sense, nor a liberty, nor a power.

A foreign sovereign or an ambassador cannot be tried by the courts of law of the country. This immunity is neither a legal right nor a legal wrong nor a liberty nor a power. It is merely an exemption from the ordinary process of the courts of the land. The Members of Parliament cannot be arrested during the *seismon*.

### **Rights and Duties of the State**

According to Austin: "The sovereign has no rights and duties. It cannot issue commands against itself or bind itself to anything. Consequently, no subject can own a right against the State." Under the English law, a person is allowed to sue the State in certain cases only when the State allows him to do so. The special procedure of the petition of right has to be followed. The subject has to approach the State in the form of a beggar. He cannot enforce his right.

The State can have no rights. As the State has no political superior over it, there is none to confer a legal right on it. If we suppose that the State has rights, we take away from it its sovereignty. According to Hibbert, to concede rights to the State is to confuse might with right. Such a view is based on the fact that sovereignty is unlimited and illimitable. However, that is not the case with sovereignty.

According to Gray: "The State has an indefinite power to create legal right for itself; but the only legal rights which the State has at any time are those interests which are then protected by the law—that is, by the rules in accordance with which the judicial organs of the State are then acting." According to Pollock: "There seems to be no valid reason against ascribing

rights to the State in all cases whether its officers are enjoined or authorised (by law) to take steps for causing the law to be observed and breakers of the law to be punished."

### **Rights against State**

However, according to Holland, the State possesses rights against the subjects and it also owes duties to the subjects. According to Salmond, a subject may claim rights against the State in the same way as against another subject. The right of a subject is not a perfect right as it cannot be enforced. A State cannot enforce a judgment against itself.

Jethrow Brown writes: "We cannot refuse to describe the sovereign's liability as a legal duty on the ground that the sanction is self-imposed, if as a matter of fact the sanction is invariably admitted by the sovereign and applied by the courts." If the sovereign having laid down the law that contracts shall be enforced enters into contracts with his own subjects and if those contracts are enforced as a matter of fact by its courts even as against the sovereign, then it is impossible to deny that the sovereign is under a legal duty towards its subjects. The view of Sir John Salmond is that the right of the subject in such a case is an imperfect right because although a judgement can be obtained against the sovereign, it cannot be enforced against the will of the sovereign and can be enforced only with the assistance of the sovereign. The view of Pollock is: "According to the view of the nature of law which regards it as the command of supreme political authority and nothing else, it is difficult to describe rights and barely possible to ascribe duties to the State." Salmond says: "If the judicial proceedings in which the State is a party are properly included within the administration of justice, the principles by which they are governed are true principles of law in accordance with the definition of law, and the right defined by these legal principles are true legal rights." The better view seems to be that the State can have rights and is subject to duties. It is true that the rights of the subject against the State as well as the duties of the State towards the subjects are prescribed by the State itself which has the physical power to disregard them and the constitutional power to repudiate them but nevertheless they are true legal rights and legal duties in so far as they are normally capable of enforcement in courts of law.

A change has been brought about in the law of the country by the passing of the Crown Proceedings Act of 1947. In certain cases, the aggrieved party has been given the power to file a suit against the government. In spite of this, the Crown possesses certain advantages in matters of litigation.

In the case of India, the State has both rights and duties. Legal duties have been imposed upon the State by the Constitution in the form of fundamental rights. There is no provision for a special procedure like that of the petition of right. A suit can be filed against the Union of India and the State Governments and *vice versa*.

### **Estate and Status**

An estate connotes the rights of the owner in the property. Status includes not only his rights but also his duties, liabilities and disabilities.

Many *definitions of status* have been given by various writers. According to Austin: "Where a set of rights and duties, capacities and incapacities, specially affecting a narrow class of persons, is detached from the bulk of the legal system and placed in a separate head for the convenience of exposition, that set of rights and duties, capacities and incapacities, is called status." According to Scott, L. J.: "Status is in every case the creation of substantive law; it is not created by contract although it may arise out of contract, as in the case of marriage where the contract serves as the occasion for the law of the country of the husband's domicile to fix the married status of the parties to the contract." According to Allen, status is "the conditions of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities and incapacities or both". According to Westlake, status is "the sum of liberties in which a person's condition differs from that of the normal man". According to Brett, L. J.: "The status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community." The status of a person is not defined by contract or agreement but by law.

According to Sir Henry Maine, status means a legal condition in which rights and duties are imposed by the operation of

law. The status of a person is determined without his consent. Marriage creates status in this sense. Although it comes into existence by the agreement of the parties, it cannot be dissolved at the will of the parties and they are bound by the legal conditions imposed by law. According to Sir Henry Maine, the movement of progressive society has been from *status to contract*.

Dicey refers to seven particular kinds of status, *viz.*, parent and child, guardian and ward, infancy, legitimacy, husband and wife, lunatic and curator and corporation.

### **Rights of Beneficiary**

The right of the beneficiary in trust property is an equitable right. The beneficiary is an equitable owner and the trustee is the legal owner. However, there is a difference of opinion whether the rights of the beneficiary are rights *in rem* or rights *in personam*.

Historically, the right of a beneficiary was regarded to be a right *in personam*. The right was available against the trustee personally. However, things changed later on. The limitation of binding the trustee personally was removed and now the right of a beneficiary is considered to be of a proprietary nature. The beneficiary has a right in trust property against the whole world except in case of a *bona fide* purchaser for value and without notice of the trust.

According to Maitland, Langdell and Amos, the right of a beneficiary is a right *in personam*. A trust binds only a certain class of persons and not the world at a large. It was held in the case of *Burgess v. Wheate* that the right of the beneficiary is a personal one and cannot pass to the Crown by escheat. In another case, it has been held that death duties are liable to be paid in England if the trustee lives in England although the property is situated outside England.

Another view is that the right of a beneficiary is a right *in rem*. The beneficiary is the owner of trust property. It is the duty of the trustee to hold the trust property for the benefit of the beneficiary. This is not only the view of Hohfeld but also of the House of Lords.

Paton points out that it is frequently contended that the right of the beneficiary is not a right *in rem* as it is not available against a *bona fide* purchaser for value and it is not merely a right *in personam* against the trustee. However, if we admit that a right is not *in rem* merely because it can be defeated by a particular class of purchaser, the same argument applies not only to the beneficiary but also the whole class of negotiable instruments. He asks the question whether a person has no right *in rem* to his money merely because another person who receives it for value and in good faith acquires the superior title although the same was originally taken from him by a thief.

The present view is that the right of a beneficiary is a right *in rem* and not *in personam*. However, the matter has not been finally concluded.

### Kinds of Civil Rights

Civil rights are of two kinds. Those are primary and sanctioning rights. The object of civil proceedings is the enforcement of the right of the plaintiff. The right so enforced is either primary or sanctioning. A sanctioning right is one which arises out of the violation of another right. All other rights are primary rights. If *A* enters into a valid contract with *B*, the right of *A* to have the contract fulfilled is the primary right. If the contract is broken, his right to damages for the breach is a sanctioning right.

The purpose of a sanctioning right can be penal action which means the imposition of a pecuniary penalty upon the defendant for the wrong committed by him. It can also be restitution and penal redress, i.e., grant of pecuniary compensation to the plaintiff in respect of the damage which he has suffered from the wrongdoing of the defendant.

Penal action does not mean penal prosecution. It means a civil action in which the defendant is made to pay a penalty. The law often creates and enforces a sanctioning right which has in it no element of compensation to the injured person. It is intended only as a punishment for the wrongdoer. The action is called penal action as it is brought for the recovery of a penalty although it is not a criminal proceeding.



available against the whole world. A personal right is available only against a particular person. My right to the possession and use of money in my purse is a real right. However, my right to receive money from a person who owes me is a personal right. I have a real right against everyone not to be deprived of my liberty or reputation. I have a personal right to receive compensation from any individual who in any way harms me. I have a real right to use and occupy my house but I have a personal right to get accommodation in some hotel.

Real rights are more important than personal rights as they are available against the whole world. The right of a patentee is much more valuable than the right of a person who has purchased the goodwill of business from another person.

According to Salmond, all real rights are negative and most personal rights are positive although in a few exceptional cases they are negative. A real right is nothing more than a right to be left alone by others. It is merely a right to their passive non-interference. No person can have a legal right to the active assistance of all the world. The only duties which can be expected from the whole world are of a negative character.

Although all legal rights are negative, it is not true that all personal rights are positive. This is so in most of the cases. However, there are certain cases in which rights are both negative and personal. These are usually the product of some agreement by which some particular individual deprives himself of a liberty which is enjoyed by others. While traders can compete with me, the person whose goodwill of a business I have purchased is restrained from competing with me. I have the right of exemption from competition from that person and that right is both personal and negative. My right is protected against a particular individual alone.

It is to be observed that real rights are rights *in rem* but personal rights are rights *in personam*. Real rights are always negative rights but personal rights are generally positive rights. A real right is protected against the whole world but a personal right prevails against a determinate person or persons.

#### (4) *Rights in rem and Rights in personam*

These terms are derived from the Roman terms "*actio in rem*"

and "*actio in personam*". An *actio in rem* was an action for the recovery of *dominium*. The plaintiff claimed that a certain thing belonged to him and the same ought to be restored or given to him. An *actio in personam* was one for the enforcement of an *obligatio*. In such a case, the plaintiff claimed the payment of money, the performance of a contract or the protection of some other personal right vested in him as against the defendant. The right protected by an *actio in rem* came to be called *jus in rem* and a right protected by *actio in personam* came to be called *jus in personam*. These terms were invented by the commentators of civil law and are not to be found in the original sources.

Literally interpreted, *jus in rem* means a right against or in respect of a thing *Jus in personam* means a right against or in respect of a person. As a matter of fact, every right is at the same time one in respect of something and against some person. Every right involves not only a real but also a personal relation. Although the two relations exist together, their relative importance is not the same. In real rights, it is the relation to the thing which is very important. In the case of personal rights, it is the relation to other persons who owe the duties which is important. Real rights are usually derived from some special relation to the object but personal rights are derived from special relation to the individual or individuals under the duty.

A right *in rem* is available against the whole world but a right *in personam* is available against a particular individual only. A right *in rem* is available against persons generally. Examples are rights of ownership and possession. My right of possession and ownership is protected by law against all those who may interfere with the same. A right *in personam* corresponds to a duty imposed upon determinate persons. Rights under a contract are rights *in personam* as the parties to the contract alone are bound by it. The right of a creditor against a debtor is a right *in personam*. The same is the case with the right of a landlord to recover rent from a tenant. However, my right to reputation is a right *in rem*. I have a right to prosecute all those who dare to libel me. Rights *in rem* are almost always negative. Those are rights to be left alone. Rights *in personam* are usually positive and negative only in exceptional cases. This is so in the case of sale of goodwill

when the seller promises not to set up a rival business within a particular locality and for a specific period. The right of the purchaser is both negative and *in personam*. He acquires the right of exemption from competition from the seller.

Rights *in personam* usually arise out of contracts but a contract alone is not the sole source of personal rights. It is possible to have rights against a definite individual independently of any agreement with him. One may have the right to receive compensation from a wrongdoer for the breach of a duty imposed upon him by law and not by contract. Such a right is a personal right arising independently of contract. The rights which arise out of *status* are also rights *in personam*. They are not of so definite a character as to be reducible to a money value. The rights and duties which arise out of coverture or by membership of a family consist often in lifelong course of conduct and do not always have an economic significance. In this respect, they differ from rights *in personam* that arise out of a contract.

Dr. Holland has explained the distinction between the rights *in rem* and rights *in personam* by an example. If a surgeon is practising in a town, there is a negative duty incumbent on all not to prevent him from exercising his calling. There is no general duty not to compete for his practice and hence a rival may establish another surgery shop next door. However, if the surgeon bought his business from a predecessor who contracted with him not to practise in that town, the predecessor would be under a contractual duty of not competing with the successor by the exercise of his profession in that town. The rights of the surgeon against his predecessor are rights *in personam* and his rights against everyone else are rights *in rem*. The personal right in this illustration is a negative one. It corresponds to the negative duty of his predecessor not to compete with him. Rights *in personam* are usually positive rights which correspond to positive duties undertaken by a determinate person.

#### (5) *Proprietary and Personal Rights*

The proprietary rights of a person include his estate, his assets and his property in many forms. Proprietary rights have some economic or monetary value. Examples of proprietary rights are the right to debt, the right to goodwill, the right to patent, *etc.*

Proprietary rights are valuable but personal rights are not valuable. Proprietary rights are the elements of the wealth of a man. Personal rights are merely elements in his well-being. Proprietary rights possess not merely judicial but also economic importance. Personal rights possess merely judicial importance.

The distinction between proprietary and personal rights is not confined to rights in the strict sense of the term but applies to other classes of rights as well. The estate of a person is made up not merely of his valuable claims against other persons but also of such of his powers and liberties as are either valuable in themselves or are accessory to other rights which are valuable. A general power of appointment is proprietary but the power of making a will or a contract is personal. A liability to be sued for a debt is proprietary but a liability to be prosecuted for a crime is personal. The duty of fulfilling a contract for the purchase of goods is proprietary, but the duty of fulfilling a contract to marry is personal. The status of a person is made up of his personal rights, duties, liabilities and disabilities. The same person may have at the same time the status of a free man, a citizen, a husband, a father, *etc.* When we speak of the status of a wife, we refer to all her personal benefits and burdens arising out of marriage. In the same way, we speak of the status of an alien, a lunatic or an infant. The true test of a proprietary right is not whether it can be alienated but whether it is equivalent to money. It may be equivalent to money although it may not be possible to sell it for a price. A right to receive money or something which can itself be turned into money, is a proprietary right and is to be counted as a part of the estate of the possessor although the same may not be alienable.

#### (6) *Inheritable and Uninheritable Rights*

A right is inheritable if it survives its owners. It is uninheritable if it dies with him. Proprietary rights are inheritable but personal rights are uninheritable. The heirs of a proprietary owner become owners after his death. In the case of personal rights, they die with the owner and cannot be inherited.

#### (7) *Rights in re propria and rights in re aliena*

According to Salmond, a right *in re aliena* or encumbrance is one which limits or derogates from some more general right

belonging to some other person in respect of the same subject-matter. All other rights are rights *in re propria*. These two terms were invented by the commentators on civil law and are not to be found in the original sources. The owner of a chattel has *jus in re propria* or a right over his own property. The pledgee has *jus in re aliena* or a right over the property of someone else. Rights *in re propria* are rights in one's own property. These are complete rights to which other rights can be attached. Rights *in re aliena* are rights over the property of another person. These rights derogate from the rights of other persons and add to the rights of their holder. My right of ownership of my land is a right *in re propria*. My right of way across the land of another person is a right *in re aliena*. My right of way is the dominant right. A dominant right is an encumbrance and a servient right is subject to an encumbrance. In the case of a landlord and tenant, the lessee has a dominant right *in re aliena* and the lessor has a servient right *in re propria*.

There are four main classes of encumbrances, *viz.*, leases, servitudes, securities and trusts. A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another. A servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by possession of it. Examples of servitudes are the right of way, the right to the passage of light or water across an adjoining land, *etc.* A security is an encumbrance vested in a creditor over the property of his debtor for the purpose of securing the recovery of the debt. An example of security may be the right to retain possession of a thing till the payment of the debt. A trust is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of someone else. The owner of the encumbered property is called the trustee and the owner of the encumbrance is called the beneficiary.

### (8) *Principal and Accessory Rights*

Principal rights exist independently of other rights. Accessory rights are appurtenant to other rights and they have a beneficial effect on the principal rights. A security is accessory to the right secured. A servitude is accessory to the ownership of the land for whose benefit it exists. The rent and covenant of a lease are

accessory to the ownership of the property by the landlord. Covenants for title in a conveyance are accessory to the estate conveyed. A right of action is accessory to the right for whose enforcement it is provided.

*X* owes money to *Y* and he executes a mortgage deed in favour of *Y*. The debt is the principal right and the security in the form of mortgage is the accessory right. The security has a beneficial effect on the principal right of recovery. The mortgage continues so long as the debt is not paid and is extinguished when the debt is paid off. *X* has a piece of land and as the owner of that land, he has the right of way on the adjoining land. The ownership of the land by *X* is the principal right. The right of way in the adjoining land is the accessory right. When the land is sold by *X*, the accessory right of way is also lost. A dominant right is generally an accessory right. There is an exception in the case of a lease which is a dominant right and not an accessory right.

#### (9) *Legal and Equitable Rights*

Legal rights were recognized by common law courts and equitable rights were recognized by the Court of Chancery. The Judicature Act of 1873 put an end to the distinction between legal and equitable rights. Although no court now recognises the distinction between legal and equitable rights, the distinction is still of great importance. The methods of their creation and disposition are different. A legal mortgage must be created by deed but an equitable mortgage may be created by a written agreement or by the deposit of title deeds. The same is the case with legal and equitable leases. Equitable rights have a more precarious existence than legal rights. When there are two inconsistent legal rights claimed by different persons over the same thing, the first in time prevails. The same is the case when there is a competition of two inconsistent equitable rights. However, when there is a conflict between a legal right and an equitable right, the legal right prevails and destroys the equitable right even if it is subsequent to the equitable right in origin, but the owner of the legal right must have acquired it for value and without notice of the prior equity. If there is a competition between a prior equitable mortgage and a subsequent legal

mortgage, preference is given to the subsequent legal mortgage. The rule is that where there are equal equities, the law prevails.

In India, there are no separate equity courts and both common law and equity jurisdictions are combined in one court which acts according to justice, equity and good conscience in the absence of specific rules of law. The expression "*justice, equity and good conscience*" implies the rules of English equity so far as those are applicable in India. In the absence of a specific law on the subject, the practice of the English equity courts is followed in India with necessary modifications.

Under Clause 36 of the Supreme Court Charter of 1823, the Supreme Court of Bombay was expressly made a Court of Equity and given an equitable jurisdiction corresponding to that of the Court of Chancery. Regulation 4 of 1827 required the Courts of the East India Company to act according to justice, equity and good conscience in the absence of a specific law and usage.

In England, estates are either legal or equitable. The right of the mortgagor to redeem the property is regarded as a creation of the courts of equity and is an equitable right known as the equity of redemption. Such is not the case in India where no distinction is made between legal and equitable estates.

In England, these estates are recognised. A contract to sell property in England creates an interest in favour of the purchaser and the vendor holds the property in trust for him. Sections 40 and 54 of the Transfer of Property Act of India show that merely by virtue of a contract of sale of an immovable property, no interest is created in favour of the purchaser, but only an obligation is annexed to the ownership of the property.

In England, a mortgage passes the legal estate to the mortgagee and the mortgagor has only the equitable estate which means the equity of redemption. In India, what passes to a mortgagee is a few rights of ownership of the mortgagor who still continues to be the owner of the mortgaged property.

In *Chhatra Debi v. Mohan Bikram*, the Privy Council observed: "The Indian law does not recognise legal and equitable estates. By that law, therefore, there can be but one owner and where the property is vested in a trustee, the owner must be the trustee.

This is the view embodied in the Indian Trusts Act, 1882, *see* Sections 55, 56 *etc*, the right of the beneficiary being in a proper case to call upon trustee to convey to him " (58 IA 279).

#### (10) *Primary and Secondary Rights or Antecedent and Remedial Rights*

Primary rights are also called antecedent, sanctioned or enjoyment rights. Secondary rights are called sanctioning, restitutory or remedial rights. Many writers prefer to use the term antecedent and remedial but Pollock prefers to use the term substantive and adjectival rights. He does so on the ground that the term remedial does not apply to interpleader proceedings and payment of money into court by a trustee where the first step is taken not "against someone else's breach of duty but against the risk of unwilling breach of duty on his own part" Primary rights are those rights which are independent of a wrong having been committed. They exist for their own sake. They are antecedent to the wrongful act or omission. Examples of primary rights are the right of reputation, the right in respect of one's own person, the right of the owner of a guardian, *etc*. Secondary rights are a part of the machinery provided by the State for the redress of injury done to primary rights. Their necessity arises on account of the fact that primary rights are very often violated by persons. Secondary rights come in the form of remedial rights.

#### (11) *Public and Private Rights*

A public right is possessed by every member of the public. When one of the persons connected with the right is the State and the other is a private person, the right is called a public right. A private right is concerned only with individuals. Both the parties connected with this right are private persons. Private rights are of an infinite variety and are enjoyed by individuals who happen to own certain property, who hold a certain office, who enter into a contract, *etc*

Public and private rights differ in the same way as public and private wrongs differ. According to Blackstone "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals and are thereupon frequently termed civil injuries; the latter are a breach and viola-



tion of public rights and duties which affect the whole community (or the State) considered as a community and are distinguished by the harsher appellation of crimes and misdemeanours." However, Salmond pointed out that all public wrongs are not crimes. The breach of a public trust is a public wrong but the method of redress is a civil one. Moreover, all crimes are not public wrongs. Many minor offences can be punished at the instance of a private person.

### (12) *Vested and Contingent Rights*

A vested right is a right in respect of which all events necessary to vest it completely in the owner have happened. No other condition remains to be satisfied. In the case of a contingent right, only some of the events necessary to vest the right in the contingent owner have happened. If a valid deed of transfer is executed by *A* in favour of *B*, *B* acquires a vested right. All formalities are complete and nothing remains to be done. However, if a property is given to a person on the condition that he will be entitled to take possession of it only if he attains the age of 21, the right acquired is a contingent right. The right fails if the person dies before he attains the age of 21.

According to Paton: "When all the investitive facts which are necessary to create the rights have occurred, the right is vested; when part of the investitive facts have occurred, the right is contingent until the happening of all the facts on which the title depends."

### (13) *Servient and Dominant Rights*

A servient right is one which is subject to an encumbrance. The encumbrance which derogates from it may be contrasted as dominant. The land for the beneficial enjoyment of which the right exists is called the dominant heritage and the owner or occupier thereof is called the dominant owner. The land on which the liability is imposed is called the servient heritage and the owner or the occupier is called the servient owner. *X* as the owner of a certain house has a right of way over the land of *Y*, his neighbour, or has the right of maintaining eaves for the discharge of water from his roof on to *Y*'s grounds. The house of *X* is the dominant heritage and *X* is the dominant owner. The house of *Y* is the servient heritage and *Y* is the servient owner.

#### (14) *Municipal and International Rights*

Municipal rights are conferred by the law of a country. International rights are conferred by international law. All municipal rights are enjoyed by the individuals living in a country. The subjects of international rights are the persons recognized as such by international law. There is no unanimity of opinion as to who are the international persons recognized by international law. According to one view, only the States are the subject of international law. According to another view, individuals are also the subject of international law.

#### (15) *Rights at Rest and Rights in Motion*

This classification of rights has been given by Holland. According to him, when a right is stated with reference to its 'orbit' and its 'infringement', it is a right at rest. The meaning of the term 'orbit' is the sum or the extent of the advantages conferred by the enjoyment of the rights. The term 'infringement' means an act which interferes with the enjoyment of those advantages. Causes by which rights are either connected or disconnected with persons are discussed under rights in motion. Hibbert points out that this classification leaves no place for the treatment of absolute duties. He suggests the substitution of the term 'duty' for the term 'right'.

#### (16) *Ordinary and Fundamental Rights*

Some rights are ordinary rights and some are fundamental rights. The Constitution of India has guaranteed certain fundamental rights to the citizens of India like the right to life and equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, and the right to constitutional remedies. In the case of *Golak Nath*, it was held by the Supreme Court that the Fundamental Rights of the people cannot be curtailed at all even by a constitutional amendment but the Constitution has been so amended as to provide that even fundamental rights can be curtailed by constitutional amendments. [AIR 1967 SC 1643].

#### (17) *Jus ad rem*

A *jus ad rem* is a right to a right. The person of inherence has the right to have some other right transferred to him. The

*jus ad rem* is always a right *in personam*. If I sell my house to *K*, *K* acquires a right against me to have the house transferred to himself. The right of *K* is said to be a *jus ad rem*. Whether the right to be transferred is a *right in rem* or only a *right in personam*, the *jus ad rem* is always a *right in personam*.

### SUGGESTED READINGS

- Bryce, J. : *Studies in History and Jurisprudence*, Oxford, 1901.
- Buckland, W.W. : *Some Reflections on Jurisprudence*, Cambridge University Press, 1945.
- Denning, A.T. : *The Road to Justice*, Stevens & Sons, 1955.
- Fuller, L.L. : *The Morality of Law*, Yale University Press, 1969.
- Goodhart, A.L. : *English Law and the Moral Law*, 1955.
- Gray, J.C. : *The Nature and Sources of the Law*, Macmillan Co., New York, 1921.
- Hall, J. : *Foundations of Jurisprudence*, 1973.
- Hart, H.L.A. : *The Concept of Law*, Clarendon Press, 1975.
- Hearn, W.E. : *The Theory of Legal Duties and Rights*, London, 1883.
- Holland, T.W. : *The Elements of Jurisprudence*, Oxford, Clarendon Press, 1924.
- Jenks, E. : *The New Jurisprudence*, John Murray, 1933.
- Kantorowicz, H.U. : *The Definition of Law*, Cambridge University Press, 1958.
- Keeton, G.W. : *The Elementary Principles of Jurisprudence*, 1949.
- Kelsen, H. : *General Theory of Law and State*, Harvard University Press, 1949.
- Kocourek, A. : *Jural Relations*.
- Korkunov, N.M. : *General Theory of Law*, 1909.
- Llewellyn, K.N. : *Jurisprudence: Realism in Theory and Practice*, University of Chicago Press, 1962.
- Llewellyn, K.N. : *The Bramble Bush*, New York, 1930.
- Markby, W. : *Elements of Law*, Oxford, 1905.
- Olivecrona, K. : *Law as Fact*, 1962.
- Paton, G.W. : *A Text Book of Jurisprudence*, Clarendon Press, Oxford, 1972.
- Patterson, E.W. : *Jurisprudence*, 1953.
- Pound, R. : *Jurisprudence*, West Publishing Co., 1959.

- Ross, A. : *Directives and Norms*, 1968.
- Ross, A. . *On Law and Justice*, Stevens & Sons, 1958.
- Smith, J. C. . *Legal Obligation*, University of London, 1976.
- Vinogradoff, P. . *Commonsense in Law*, Oxford University Press, 1959.

## XIV

# OWNERSHIP AND POSSESSION

### OWNERSHIP

The concept of ownership is one of the fundamental juristic concepts common to all systems of law. This concept has been discussed by most of the writers before that of possession. However, it is pointed out that it is not the right method. Historically speaking, the idea of possession came first in the minds of people and it was later on that the idea of ownership came into existence. The idea of ownership followed the idea of possession.

#### *Development of the Idea of Ownership*

The idea of ownership developed by slow degrees with the growth of civilization. So long as the people were wandering from place to place and had no settled place of residence, they had no sense of ownership. The idea began to grow when they started planting trees, cultivating lands and building their homes. The transition from a pastoral to an agricultural economy helped the development of the idea of ownership. People began to think in terms of "mine and thine". To begin with, no distinction was made between ownership and possession. However, with the advancement of civilization, the distinction became clearer and clearer. This distinction was made very clearly in Roman law. Two distinct terms were used to point out the distinction and these were '*dominium*' and '*possessio*'. *Dominium* denoted the absolute right to a thing. *Possessio* implied only physical control over a thing. The English notion of ownership is similar to the conception of *dominium* in Roman law. According to Holdsworth, the English law reached the concept of ownership as an absolute right through developments in the law of possession.

#### **Definition of Ownership**

According to Keeton: "The right of ownership is a conception clearly easy to understand but difficult to define with exacti-

tude. There are two main theories with regard to the idea of ownership. The great exponents of the two views are Austin and Salmond. According to one view, ownership is a relation which subsists between a person and a thing which is the object of ownership. According to the second view, ownership is a relation between a person and a right that is vested in him."

### *Austin*

According to Austin: "Ownership means a right which avails against everyone who is subject to the law conferring the right to put thing to user of indefinite nature." Full ownership is defined as "a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration". It is a right *in rem* which is available against the whole world.

(1) According to Austin, the *first attribute* of ownership is that it is indefinite in point of user because the thing owned may be used by the owner in very many ways. The owner of land may build a house on it. He may use it for cultivation. He may convert it into a garden. He may make any use of it he pleases. However, restrictions may be imposed on the use of the thing by means of an agreement or by the operation of law. The owner may mortgage the land to somebody for a specific period and also hand over the possession of the same. He may lease the land to somebody for a specified number of years. He may create an easement in favour of another person. The owner of the land cannot be allowed to use the same in a way which is injurious to others. Reference may be made to two maxims in this connection. The first maxim is: "So use your own property as not to injure your neighbour's." The second maxim is: "It is not lawful to build upon your land to the injury of another." In the case of *Crowhurst v. Amersham Burial Board*, the Burial Board was held responsible for damages to the extent of the price of the horse which died on account of eating a portion of a yew tree planted by the Burial Board on its own land and about 4 feet from its boundary railings. The horse was grazing in a neighbouring meadow and died of the poison in the leaves of that tree. The owner of a piece of land cannot erect a building on his land in such a way as to interfere with the use of the adjoining property. (1878) 4 Ex. D. 5.

(2) The *second attribute* of ownership is a right of transfer or

disposition without any restriction. However, experience shows that in all advanced legal systems, certain restrictions are imposed on the right of disposal of the owner. The transfer of property is not allowed if its object is merely to defeat or delay the creditors. In the case of France, certain restrictions are imposed on the right of alienation in the interests of the family. In the case of Germany, transfer or division of small farms is not allowed.

(3) The *third attribute* of ownership is the permanence of the right of ownership. This right exists so long as the thing exists. The right is extinguished with the destruction of the thing. Ownership is inherited by his successor.

Austin's view of ownership has been *criticized* on various grounds.

(1) It is pointed out that ownership is not a right but a bundle of rights. It is the aggregate or sum — total of the rights of user and enjoyment. Even if some of the rights are removed and given to another person, the person in whom vests the residue is still the owner. The owner of a piece of land may mortgage the same to another person. Although he has transferred a right, he is still the owner.

(2) Ownership is not merely a right but also a relationship between the right owned and the person owning it.

(3) The idea of the right of indefinite user is also attacked. Many limitations can be put upon that user. The owner must use his property in such a way as not to interfere with the rights of others. He may have to pay taxes to the State in connection with the property. He may not have the right to exclude the officers of the government who are entitled to enter upon it on certain grounds. In the case of joint ownership of property, the rights of each are controlled by those of others. Restrictions may be imposed upon ownership by encumbrances. Restrictions may also be imposed on the power of disposition of property by owners. An owner of property is not allowed to dispose of the same with a view to defeat or delay his creditors. There are certain disabilities imposed on infants and lunatics with regard to the disposal of property.

*Holland*

The view of ownership as given by Austin has also been followed by Holland. Holland defines ownership as "a plenary control over an object". According to him, an owner has three kinds of powers viz, possession, enjoyment and ownership. However, the same can be lost by means of a lease or mortgage. "The right of enjoyment implies a right of user and of acquiring the fruits or increase of the things as timber, the young cattle or soil added to an estate by alluvion. The right is limited only by the rights of the State or of other individuals." The right of disposition implies the right of alteration, destruction or alienation of property.

*Markby*

Markby also holds similar views. To quote him: "If all the rights over a thing were centred in one person that person would be the owner of the thing; and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centred in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it and another right to till it, the owner of a piece of furniture has not one right to repair it and another right to sell it; all the various rights which an owner has over a thing are conceived as merged in one general right of ownership."

*Hibbert*

According to Hibbert, ownership involves four rights and those are the right of using the thing, excluding others from using it, the disposal of the thing and the destruction of the thing. Under the English law, no one can have absolute ownership in land as land cannot be destroyed. One can have merely an estate in it. An estate means the legal interest of a party in land measured by duration and entitling the party to put the land to uses of an indefinite nature.

*Paton*

According to Paton, the rights of an owner are the power of enjoyment, the right of possession, the power to alienate *inter vivos* or to charge as security, and the power to leave the rest by will.

According to Hohfeld, ownership is a collection of rights,



privileges and powers, some of which are frequently found to reside, either for a limited period or perpetually, in persons other than the owner. Ownership is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops. As we can take one drop or many drops from the bucket, likewise we can detach one or several rights from ownership.

According to Buckland, ownership is "the ultimate right to the thing or what is left when all other rights vested in various people are taken out".

According to Noyes, ownership is the magnetic core which remains when all present rights of enjoyment are removed from it and which attracts to itself the various elements temporarily held by others as they lapse.

According to Pollock: "Ownership may be described as the entirety of the powers of use and disposal allowed by law. This implies that there is some power of disposal, and in modern times we should hardly be disposed to call a person an owner who had no such power at all, though we are familiar with 'limited owners' in recent usage. If we found anywhere a system of law which did not recognise alienation by acts of parties at all, we should be likely to say not that the powers of an owner were very much restricted in that system, but that it did not recognise ownership. The term, however, is not strictly a technical one in the Common Law . . . . We must not suppose that all the powers of an owner need be exercisable at once and immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment, and suspend his power of disposal, provided that he reserves for himself or his successors, the right of ultimately reclaiming the thing and being restored to his power. This is the common case of hiring land, buildings or goods. Again, the owner's powers may be limited in particular directions for an indefinite time by rights as permanent in their nature as ownership itself. Such is the case where the owner of Whiteacre has a right of way over his neighbour's field of Blackacre. As this example shows, what is thus subtracted from one owner's powers is generally added to another's. In short, the owner of a thing is not

necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person having the residue of all such powers when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere. In the same way, a ruler does not cease to be a sovereign prince merely because he has made a treaty by which he has agreed to forego or limit the exercise of his sovereign power in particular respects." (*Jurisprudence and Legal Essays*, pp. 97-98).

### Salmond

According to Salmond: "Ownership, in its most comprehensive signification, denotes the relation between a person and right that is vested in him. That which a man owns is in all cases a right. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To own a piece of land means in truth to own a particular kind of right in the land, namely, the fee simple of it." Again, "ownership, in this generic sense, extends to all classes of rights, whether proprietary or personal *in rem* or *in personam*, *in re propria* or *in re aliena*. I may own a debt, or a mortgage or a share in a company, or money in the public funds, or a copyright or a lease or a right of way, or a power of appointment, or the fee simple of land. Every right is owned, and nothing can be owned except a right. Every man is the owner of the rights which are his." According to Salmond, ownership is a relation between a person and any right that is vested in him. That which a man owns is a right and not a thing. To own a piece of land means to own a particular kind of right in the land.

### Criticism

(1) Salmond's view of ownership has been criticised by many writers. According to Duguit, ownership is a relationship between a person and a thing over which he is permitted, on account of this relationship, complete disposal, use and enjoyment. What is owned is a thing and not a right.

(2) According to Cook, there are many rights which a person may possess and to use the term 'owner' to express the relationship between a person and a right is to introduce unnecessary confusion. Ownership is the name given to the bundle of rights.

(3) According to Kocourek, ownership is a relationship of the owner and a right to a thing which can be economically enjoyed. The right of ownership is a matter of legal protection.

The apologists of Salmond point out that Salmond has defined ownership in two different senses. In the comprehensive sense, ownership denotes the relation between a person and any right that is vested in him. In this sense, it includes both corporeal and incorporeal ownership. In a narrow sense, ownership is a relation-ship between a person and a material thing. In this sense, corporeal ownership is included. To quote Salmond : "Although the subject-matter of ownership in its widest sense is in all cases a right, there is a narrow sense of the term in which we speak of the ownership of material things. We speak of owning, acquiring or transferring, not rights in land or chattels, but the land or chattels themselves. This was the original and still is the commonest meaning of the word 'ownership'. We call it by the name of corporeal ownership to distinguish it from the ownership of rights which may be called 'incorporeal ownership'."

### **Essentials of Ownership**

(1) The first essential of ownership is that it is indefinite in point of user. It is impossible to define or sum up exhaustively the wide variety of ways in which the thing owned may be used by the person entitled to its ownership. Although this is commonly called a right to possess and use such things, these rights are, in fact, liberties. The owner has actually a liberty to use the thing. He is under no duty not to use it. Others are under a duty not to use it or otherwise interfere with it.

Those who are not owners may be entitled to possess or use a thing, but the period for which they are entitled to use is of a limited duration. In the case of an owner, it is of an indeterminate duration. The interest of a bailee or a lessee comes to an end when the period of hire or of the lease comes to an end. However, the interest of the owner is perpetual. It does not terminate even with his own death. In the case of death, the property goes to his legatee or heir or next of kin.

Under all mature legal systems, qualifications have been imposed on the user of property. Every owner must so use the

object of ownership as not to injure the right of other persons. No landowner can accumulate manure on his land in such a way as to cause a nuisance to his neighbours. Officers of justice have a right to enter on the premises of anyone in pursuance of a warrant issued by a court of justice. Ownership may be subject to encumbrance in favour of others in which case the power of user of the owner is curtailed by the rights of the encumbrancers.

(2) Another essential of ownership is that it is unrestricted in point of disposition. The right of alienation is considered by Austin as a necessary incident of ownership. An owner can effectively dispose of his property by a conveyance during his lifetime or by will after his death. A person who is not the owner cannot normally transfer the right of ownership, even though he may have possession of the thing in question. This is based on the maxim that he who has not can give not.

However, restrictions are imposed by law on the power of disposal of an owner. Both in English and Indian law, transfers of property made with intent to defeat or delay creditors can be set aside. The power of disposition may be limited by the existence of the rights of encumbrancers. Hence, it cannot be said that an essential feature of ownership is the existence of an unrestricted power of disposition. Hindu jurists have explained a significant feature of the concept of ownership as fitness for free disposal. The *Viramitrodaya* gives the simile of a seed which contains within it the capacity to germinate and be converted into a sprout. Various causes may impede this capacity but it cannot be said that the capacity to germinate and take the shape of a young plant is not possessed by the seed. Likewise, although the power of an owner to deal with his property may be restrained by various considerations, it cannot be said that ownership does not connote fitness for free disposal.

(3) The owner has a right to possess the thing which he owns. It is immaterial whether he has actual possession of it or not. What matters is that he should have a right to possession. Even if the car of *X* is stolen by *Y*, *Y* has possession of the car but *X* remains the owner. Likewise, if *X* gives his car to *Y* on hire, *X* has neither possession of the car nor the immediate right to possess it, he is still the owner as he retains a reversionary interest

in the car. He has the right to repossess the car on the termination of the period of hire.

(4) Another essential of ownership is that the owner has the right to exhaust the thing while using it, if the nature of the thing owned is such.

(5) Another essential of ownership is that it has a residuary character. An owner may part with several rights in respect of the thing owned by him. In spite of that, he continues to be the owner of the thing in view of the residuary character of ownership. *X*, an owner, may give a lease of his property to *Y* and an easement to *Z*. His ownership of the land still consists of the residual rights.

(6) Generally, the owner has the right to destroy or alienate the thing he owns.

### **Subject Matter of Ownership**

The primary subject matter of ownership consists of material objects like land and chattels. The wealth of a man may also consist of other things such as interests in the land of other people, debts due to him by his debtors, shares in companies, patents, copyrights etc. *A* may have the right to walk over the land of *B*, or the right to catch fish in the pond of *C*, or a debt owing from *D*, shares in a limited company, various patents, copyrights etc. None of these is a physical or material thing. They are merely rights.

The view of Salmond is that the true subject matter of ownership has to be a right in all cases. It will be a logical absurdity if the subject matter of the ownership was sometimes a material object and at other times a right. The view of Salmond is supported by English law. However, if the term is used as always applying to a right, it would not be in keeping with law and legal usage as it is usually said that a person owns land and chattels. As owning a chattel normally means having certain rights in respect to it, to describe this as owning rights in respect of the chattels would lead to rather complicated conclusion that owner would be said to have rights to rights in respect of such chattels. Normally a man is said to have a right and not to own a right. A man does not own a right to his reputation. That is

a right which he has. It is therefore preferable to speak both of owning things in the sense of material objects and of owning rights. What thing can form the subject matter of ownership will depend upon the rules of each system of law. Broadly speaking, certain things qualify as capable of being owned but as not in fact being owned. Islands outside the territory of a State and wild animals in a jungle cannot be owned. There are things which by nature are incapable of being owned. The living persons, corpses other than anatomical specimens, the air and the sea, the sun, the moon and the stars cannot be owned. However, if English law were to permit slavery, living persons could be owned. Law may provide that the air and the sea might be owned, sold, bought, rented etc

### **Right of Ownership and Ownership of a Right**

Corporeal ownership is the right to the entirety of the lawful uses of a corporeal thing. In this sense, the corporeal ownership or the right of ownership is not so much one right as a bundle of rights, liberties, powers and immunities. Pollock writes: "Ownership may be described as the entirety of the powers of use and disposal allowed by law."

The ownership of right describes the jural relation between a person and a right. In this sense, it denotes that he is neither a possessor nor an encumbrancer, but the owner of the right. This right has to be distinguished from the right of ownership which is the complex pattern of the bundle of rights, liberties, powers and immunities. In the case of ownership of a right it only suggests that there is a particular legal relationship between a person and a right. The ownership of a right is also known as incorporeal ownership.

In English law, the interest which is by way of a perpetual ownership is called a fee simple in which ownership passes to the heir by devolution. A life interest or an interest for a specified number of years is not considered as a right of ownership because it is not perpetual.

### **Modes of Acquisition of Ownership**

There are two modes of acquisition of ownership and those are *original* and *derivative*. There are three kinds of original modes of

acquisition Ownership is absolute when the same is acquired over previously ownerless objects. Ownership is extinctive if the ownership of a previous person is finished on account of adverse possession by the acquirer. It is accessory if the ownership is acquired as a result of accession. Absolute ownership can be acquired in two ways and those are by means of occupation and 'specification'. The rule in the case of an ownerless thing is that the first occupier becomes the owner. The physical control of the thing is essential in the case of occupation. Such an ownership is acquired in the case of wild animals, birds, fish in rivers, precious stones, gems, etc. The English law on the subject is that fish and wild animals are in the possession of the person on whose land they are found. The landowner is their owner even if the fish are captured or the wild animals are killed. In the case of hidden treasures, the same belong to the Crown in England. Under the Roman law, the treasure was divided equally by the finder and owner of the place. In the case of specification, materials belonging to one person are given a new shape. Clay may belong to one person but the sculptor may make a statue out of it.

Original ownership may be acquired by long and continuous and undisputed possession of a thing as owner. The principle of adverse possession works in this connection. The ownership of one person is extinguished and that of another is created. Original ownership can also be acquired by means of accession. The owner of a tree has the right to the fruits of the tree. Likewise, the owner of land has the right to the crop grown on it. The owner of an animal has the right to its offsprings. If some land is added on account of a change in the course of the river, the same is acquired by the owner of the property adjoining it.

### **Different Kinds of Ownership**

Experience shows that there are many kinds of ownership and some of them are corporeal and incorporeal ownership, sole ownership and co-ownership, legal and equitable ownership, vested and contingent ownership, trust and beneficial ownership, co-ownership and joint ownership and absolute and limited ownership.

*Corporeal and Incorporeal Ownership*

Corporeal ownership is the ownership of a material object and incorporeal ownership is the ownership of a right. Ownership of a house, a table or a machine is corporeal ownership. Ownership of a copyright, a patent or a trade mark is incorporeal ownership. The distinction between corporeal and incorporeal ownership is connected with the distinction between corporeal and incorporeal things. Incorporeal ownership is described as ownership over intangible things. Corporeal things are those which can be perceived and felt by the senses and incorporeal things are those which cannot be perceived by the senses and which are intangible. Incorporeal ownership includes ownership over intellectual objects and encumbrances.

*Trust and Beneficial Ownership*

Trust ownership is an instance of duplicate ownership. Trust property is that which is owned by two persons at the same time. The relation between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The ownership is called beneficial ownership. The ownership of a trustee is nominal and not real, but in the eye of law the trustee represents his beneficiary. In a trust, the relationship between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee and his ownership is trust ownership. The latter is called the beneficiary and his ownership is called beneficial ownership. The ownership of a trustee is in fact nominal and not real although in the eye of law, he represents his beneficiary. If property is given to *X* on trust for *Y*, *X* would be the trustee and *Y* would be the beneficiary or *cestui que trust*. *X* would be the legal owner of the property and *Y* would be the beneficial owner. *X* is under an obligation to use the property only for the benefit of *Y*.

A trustee has no right of enjoyment of the trust property. His ownership is only a matter of form and not of substance. It is nominal and not real. In the eye of law, a trustee is not a mere agent but an owner. He is the person to whom the property of someone else is fictitiously given by law. The trustee has to use his power for the benefit of the beneficiary who is the real owner.



*Trust and Agency*:—There is some resemblance between a trust and an agency. Both a trustee and an agent administer property on behalf of another. Neither of them is the beneficial owner of that property. However, there are many differences between trust and agency. In the eye of law, a trustee is the owner of the trust property, but the agent is not the owner of the property which actually belongs to the principal. The result is that outside the sphere of his authority, an agent cannot pass a legal title to a third person even if the latter is a *bona fide* purchaser for value without notice. However, a *bona fide* purchaser for value without notice of the trust from a trustee obtains a valid title against the whole world.

In the eye of law, a trustee is the legal owner. Hence he is personally liable for all the contracts entered into by him on behalf of the trust. If an agent enters into a contract as agent, the contract is with the principal and the agent is not liable personally.

The authority of a trustee is derived from the trust deed and the wishes of the beneficiary may have nothing to do with it. The authority of the agent to deal with the property depends upon what has been delegated to him. He has to act for the principal. A beneficiary can follow the trust property in the hands of the trustee. Likewise, the principal has the right to follow the property in the hands of the agent if the latter uses his power in an unauthorised manner. In spite of this, there is no trust relationship.

An agency arises from an express or implied contract to act for some other person and property need not be involved at all. A trust arises when a person receives or holds property in such circumstances that he ought to employ it for the benefit of the beneficiary or an object other than his own.

*Trust and Mortgage*:—There is also a distinction between a trust and a mortgage. The relation between a mortgagor and mortgagee is purely contractual, but it has some analogy to trust relationship. The reason is that the mortgagor has, in equity, a beneficial interest in the property which is the equity of redemption. In the eye of law, a mortgagee has an absolute estate after the time fixed for redemption has passed. However, the mort-

gagee is not a trustee for the mortgagor. He does not hold the legal estate for the benefit of the mortgagor as a trustee holds for the beneficiary. The mortgagee has not only the legal interest in the property mortgaged, but also a beneficial interest in it adverse to that of the mortgagor

Ashburner writes that the mortgagee becomes a trustee only after he has been paid. His right in the property does not go beyond what is necessary to secure the repayment of the money due to him. If the mortgagee has sold the mortgaged property and reimbursed himself his money out of the proceeds of sale, he becomes a trustee of the surplus proceeds for the person entitled to the equity of redemption.

### *Legal and Equitable Ownership*

Legal ownership is that which has its origin in the rules of common law and equitable ownership is that which proceeds from the rules of equity. In many cases, equity recognises ownership where law does not recognise ownership owing to some legal defect. This fact can be illustrated by an example. *X* is the owner of shares in a company. He transfers those shares to *Y* who pays him the amount of the consideration but a proper transfer deed, as required by the rules of the company, is not executed with the result that the company refuses to recognise *Y* as the holder of those shares. In such a case, law may give no relief to *Y* as the legal requirements of transfer have not been complied with, but equity may step in to provide that though *X* is still the legal owner of the shares, he holds them as a trustee for *Y* and must give *Y* all the dividends and other amounts realised on account of those shares.

Legal rights may be enforced *in rem* but equitable rights are enforced *in personam* as equity acts *in personam*.

One person may be the legal owner and another person the equitable owner of the same thing or right at the same time. When a debt is verbally assigned by *X* to *Y*, *X* remains the legal owner of it but *Y* becomes its equitable owner. There is only one debt as before though it has now two owners.

The equitable ownership of a legal right is different from the ownership of an equitable right. The ownership of an equitable

mortgage is different from the equitable ownership of a legal mortgage.

Before the passing of the Judicature Acts of 1873 and 1875, there were two kinds of courts in England with separate jurisdictions. Those courts were known as common law courts and the chancery or equity courts. The rights recognised and protected by the common law courts were called legal rights and those recognised and protected by equity courts were called equitable rights. The courts of common law refused to recognise equitable ownership and maintained that the equitable owner was not an owner at all.

Keeton writes: "Equitable ownership always predicates an outstanding legal ownership, the legal owner being restrained by the rules of equity from using his legal ownership to the detriment of the equitable owner. On the other hand, legal ownership does not necessarily imply the existence of an equitable owner. The property legislation of 1925 has made use of this conception of dual ownership in order to facilitate the transfer of real property in England. Many interests which may exist with regard to land and otherwise would tend to impede the disposition of it, are now permitted to exist as equitable interests only, and it is enacted that a purchaser of a legal estate, provided that the requisite formalities are observed, may obtain a clear title, from most equitable interests, which operate upon the purchase money. A good example is the life interest. Formerly, this could exist both as a legal and as an equitable estate. Now it may exist as an equitable interest only. The most common example of equitable ownership is that which exists under a trust."

There is no distinction between legal and equitable estates in India. Under the Indian Trusts Act, a trustee is the legal owner of the trust property and the beneficiary has no direct interest in the trust property itself. However, he has a right against the trustees to compel them to carry out the provisions of the trust.

### *Vested and Contingent Ownership*

Ownership is either vested or contingent. It is vested ownership when the title of the owner is already perfect. It is contingent ownership when the title of the owner is yet

imperfect but is capable of becoming perfect on the fulfilment of some condition. In the case of vested ownership, ownership is absolute. In the case of contingent ownership, it is merely conditional. In the case of vested ownership, the investitive fact from which he derives the right is complete in all its parts. In the case of contingent ownership, it is incomplete on account of the absence of some necessary element which is nevertheless capable of being supplied in the future. In the meantime, his ownership is contingent and it will not become vested until the necessary condition is fulfilled. For example, a testator may leave property to his wife for her life and on her death to *X* if he is then alive, but if *X* is then dead, to *Y*. *X* and *Y* are both owners of the property in question, but their ownership is merely contingent. The ownership of *X* is conditional on his surviving the widow of the testator. The ownership of *Y* is conditional on the death of *X* during the lifetime of the widow.

In English law, an estate may be vested even though it does not give a right to immediate possession. On a devise to *X* for life with remainder to *Y* in fee simple, the interest of *Y* is vested because there is nothing but the prior interest of *X* to stand between him and the actual enjoyment of the land. Technically speaking, the interest of *Y* is vested in interest, though not vested in possession. It becomes vested in possession only on the death of *X*.

If a Hindu widow adopts a son but there is an agreement postponing the estate of the son during the lifetime of the widow, the interest created in favour of the adopted son is a vested right. It does not depend upon any condition precedent. If it is to take effect on the happening of an event which is certain (the death of the widow), the adopted son has a present proprietary right in the estate, the right of possession and enjoyment being deferred. He can transfer the property even during the lifetime of the widow.

Under a deed of gift, a donee is not to take possession of the gifted property until after the death of the donor and his wife. The donee is given a vested interest subject only to the life interest of the donor and his wife. The donee can transfer the property during the lifetime of the donor and his wife.

Under a compromise decree, it was settled that *X* was to hold

an estate till his death after which it was to go to *Y*. The interest acquired by *Y* under the decree is a vested interest as it was bound to take effect from the death of *X* which was a certain event. A vested interest is regarded as a property which is divisible, transferable and heritable.

*Contingent Interest.*—Where on the transfer of property, an interest is created therein for the benefit of an unborn person, the latter acquires, upon his birth, a vested interest in that property.

Where on a transfer of property, an interest is created therein in favour of a person to take effect only on the happening or not happening of a specified uncertain event, such a person acquires a contingent interest in the property. That interest becomes a vested interest on the happening of the event or when the happening of the event becomes impossible, as the case may be. A contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at present, but both depend upon future uncertain events.

There are three main features of a contingent interest. It is solely dependent upon the fulfilment of a condition so that in case of non-fulfilment of the condition, the interest may fall through. If the transferee dies before obtaining possession, the contingent interest fails and the property reverts to the transferor. A contingent interest is neither transferable nor heritable.

An estate is bequeathed to *X* until he shall marry and after that event to *Y*. The interest of *Y* in the bequest is contingent as it depends upon a condition precedent which is the marriage of *X*, an event which may or may not happen. *Y* has, at present, no proprietary interest in the estate and he cannot alienate it. As soon as *X* marries, the contingent interest of *Y* becomes a vested interest because of the happening of marriage of *X* on which it was contingent. In a contingent interest, the transfer is not complete until the specified event happens or does not happen.

*Distinction between vested and contingent interest.*—There are six points of distinction between a vested interest and a contingent interest.

(1) If on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to

take effect, or specifying that it is to take effect at once, or on the happening of an event which must happen, that interest is called vested interest. If that interest is to take effect only on the happening of a specified uncertain event or if a specified uncertain event shall not happen, the interest acquired is contingent interest.

(2) A vested interest does not depend upon the fulfilment of any condition. It creates an immediate right though the enjoyment may be postponed to a future date. A contingent interest is solely dependent upon the fulfilment of the condition. The result is that if the condition is not fulfilled, the interest falls through.

(3) A vested interest is not defeated by the death of a transferee before he obtains possession. A contingent interest cannot take effect in the event of the death of the transferee before the fulfilment of the condition.

(4) A vested interest is transferable and heritable. A contingent interest is neither transferable nor heritable.

(5) If the transferee of a vested interest dies before actual enjoyment, that vested interest passes on to his heirs. In the case of contingent interest, the interest does not pass on to his heirs because such an interest is inalienable and incapable of descending to his heirs.

(6) A vested interest is a present immediate right, even though its enjoyment is postponed. A contingent interest is not a present right. There is merely a promise for giving such right and such a promise may be nullified by the failure of the condition.

In *Sashi Kantha v. Pramodachandra*, the Calcutta High Court pointed out the distinction between a vested interest and a contingent interest in these words: "An estate or interest is vested as distinguished from contingent either when enjoyment of it is presently conferred or when its enjoyment is postponed, the time of enjoyment will certainly come to pass, in other words, an estate or interest is vested when there is immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not

happen. In other words, an estate or interest is contingent when the right of enjoyment is to accrue on an event which is dubious or uncertain." (AIR 1932 Cal 609)

*Condition Precedent and Subsequent.*—A condition precedent is one the fulfilment of which completes an inchoate title. A condition subsequent is one the fulfilment of which extinguishes a title already completed. A condition precedent always comes before the creation of an interest. A condition subsequent always follows the vesting of an interest which is already complete. The right is contingent in the case of a condition precedent. It is already vested in the case of a condition subsequent. If the condition precedent is satisfied, the vesting of the right becomes complete although the same was being held conditionally before. A condition subsequent completes the loss of a right already lost conditionally. A condition precedent involves an inchoate or incomplete investitive fact. A condition subsequent involves an incomplete or inchoate divestitive fact. He who owns property subject to a power of sale or power of appointment vested in someone else, owns it subject to a condition subsequent. His title is complete but there is already in existence an incomplete divestitive fact which may one day complete itself and cut short his ownership. A testator may bequeath his property to his son *Y* but at the same time may leave a residuary power of alienation to his widow *X*. In case *X* chooses to exercise her power, the son is deprived of the property. The ownership of *Y* is already vested but liable to premature determination by completion of a divestitive fact which is already present in part.

*X* wills his property to *Y*, his wife, on the condition that on her marriage, the same would be passed on to his sons *A* and *B*. When *X* dies, the ownership of the property vests in *Y* and *A* and *B* have contingent ownership. If *Y* remarries, she is divested of her vested ownership and the contingent ownership of *A* and *B* becomes vested ownership. What is a condition subsequent for *Y* is a condition precedent for *A* and *B*.

There are four characteristics of a condition precedent. A condition precedent is one which must happen before the estate can vest. The estate is not in the grantee until the condition is performed. In the case of a condition precedent being or

becoming impossible of performance or being immoral or opposed to public policy, the transfer will be void. A condition precedent is deemed to be fulfilled if it is substantially complied with.

There are four characteristics of a condition subsequent. An existing estate is defeated by the happening of a condition subsequent. In the case of a condition subsequent, the estate immediately vests in the grantee and remains with him till the condition is broken. In the case of an impossible, unlawful and immoral condition subsequent, the estate becomes absolute and the condition has to be ignored. Where a gift was made with a condition that the donee should marry a particular person on or before he attained the age of 21 and the person named died before she attained the age of 21, it was held that as the fulfilment of the condition subsequent had become impossible, the estate became absolute. A gift to which an immoral condition is subsequently attached remains a good gift, though the condition is void. A condition subsequent has to be strictly complied with.

*Distinction between condition precedent and subsequent*

1. A condition precedent comes before the creation of the interest. In the case of condition subsequent, the interest is created before and the condition subsequent can operate and divest it afterwards.

2. In the case of condition precedent, the vesting of the estate is postponed till the performance of the condition precedent. In the case of condition subsequent, vesting is complete and not postponed.

3. In the case of condition precedent, an interest once vested can never be divested by reason of non-fulfilment of the condition. In the case of condition subsequent, interest, even though vested, is liable to be divested by reason of the non-fulfilment of the condition.

4. In the case of condition precedent, an estate is not in the grantee until the condition precedent is performed. In the case of condition subsequent, the estate immediately vests in the grantee and remains in him till the condition is broken.

5. In the case of condition precedent, transfer will be void if the condition precedent is impossible of performance, or immoral,



or opposed to public policy. In the case of condition subsequent, the transfer becomes absolute and the condition will be ignored if that condition is impossible of performance or immoral or opposed to public policy.

6. In the case of condition precedent, the condition precedent must be valid in law. In the case of condition subsequent, it need not be so and the invalidity of the conditions can be ignored.

7. In the case of condition precedent, the doctrine of *cypres* applies and the condition precedent is fulfilled if it is substantially complied with. As regards condition subsequent, it must be strictly fulfilled. The doctrine of *cypres* does not apply.

#### *Sole Ownership and Co-ownership*

Ordinarily, a right is owned by one person only at a time. However, duplicate ownership is as much possible as sole ownership. Two or more persons may have the same right vested in them. That may be done in many ways and one of them is that of co-ownership. The right is an undivided unity. By means of a partition, the co-ownership can be ended and the parties concerned can have their own separate shares. The members of a partnership are co-owners of the partnership property. When the right of ownership is vested exclusively in one person, it is called sole ownership. Salmond writes: "Co-ownership, like all other forms of duplicate ownership, is possible only so far as law makes provision of harmonising in some way the conflicting claims of the different owners *inter se*. In the case of co-owners, the title of one is rendered consistent with that of the others by the existence of the reciprocal obligations of restricted use and enjoyment."

Partners are co-owners of the chattels which constitute their stock-in-trade. Their right is not a divided right, each of them owning a separate part. The right is an undivided unity which is vested at the same time in more than one person. If two partners have in their bank a credit balance of Rs. 4000, there is one debt of Rs. 4000 due from the bank to both of them at once and not two separate debts of Rs. 4000 due to each of them individually. Each party is entitled to the whole sum of Rs. 4000 just as each would owe to the bank the whole of the firm's overdraft. Co-ownership involves the undivided integrity of the right owned.

*Co-ownership and Joint Ownership*

According to Salmond, "co-ownership may assume different forms. Its two chief kinds in English law are distinguished as ownership in common and joint ownership. The most important difference between these relates to the effect of death of one of the co-owners. If ownership is common, the right of a dead man descends to his successors like other inheritable rights, but on the death of one of two joint owners, his ownership dies with him and the survivor becomes the sole owner by virtue of this right of survivorship or *jus accrescendi*."

If a property belongs to *X* and *Y* in equal shares and if it is a case of ownership in common, half the property will pass to the heirs of *X* on his death and the other half will remain with *Y*. However, if *X* and *Y* are joint owners, *Y* would be entitled to the whole property and the heirs of *X* would get nothing. Each owner in common is interested in a part or in a share but not in the whole of the property.

Common ownership is familiar to Hindu law. Joint ownership of the English law type is rather foreign to Hindu law and the presumption usually made where the grantees are Hindus, is that they hold in common. The joint ownership familiar to Hindu law is the special kind of which the joint holding by the members of an undivided Mitakshara joint family is the type. The distinguishing feature of a Mitakshara coparcenary is the right of survivorship possessed by its members. It resembles the joint tenancy of English law. However, a Mitakshara coparcenary is liable to be enlarged by the birth of male issue to the coparceners. Invested with a right by birth, the male issue also becomes a coparcener. This feature is absent in the joint ownership of English law.

*Absolute and limited ownership*

An absolute owner is one in whom are vested all the rights over a thing to the exclusion of all. This means that excepting the absolute owner, there is no other person who has any claim whatsoever to the thing in question. However, this does not mean that he can use his property in any way he likes. Restrictions can be imposed both by law and also by voluntary agreement.

When there are limitations on the user, duration or disposal of rights of ownership, the ownership is limited ownership. An example of limited ownership in English law is life tenancy when an estate is held only for life. Before 1956, the estate of a woman in the Hindu law was a limited ownership. If a Hindu woman inherited property from a male or a female, it was called woman's estate. She held the property only for her life and she had only a limited power of disposal. After her death, the property went to the heirs of the last holder of the property.

### POSSESSION

According to Salmond, "in the whole range of legal theory, there is no conception more difficult than that of possession." According to Bentham: "To define possession is to recall the image which presents itself to the mind when it is necessary to decide between two parties, which is in possession of a thing and which is not. But if this image is different with different men; if many do not form any image; or if they form a different one on different occasions, how shall a definition be found to fix an image so uncertain and variable. Defining the concept of possession in law is like defining the geometric conception of roundness. Absolute roundness cannot be defined and is nowhere to be found. We may say that a thing is round when it is round enough for practical purposes, in other words, a thing is round when it is so nearly round that one is not conscious that it is not round. Thus, for practical purposes a ping-pong ball is taken as round although it is not absolutely round. Similarly legal possession cannot be defined absolutely and perfectly, but for practical purposes certain conditions and rules of legal possession can be laid down for the guidance of the courts."

#### *Importance*

Possession is one of the most important concepts in the whole range of legal history. According to Holland: "The ascertainment of the nature of legal possession is, in fact, indispensable in every department of law. It is as essential to the determination of international controversies arising out of the settlement of new countries, or to the conviction of a prisoner for larceny, as it is to the selection of the plaintiff in an action of trover or trespass."

Many important legal consequences flow from the acquisition and loss of possession. Possession is the *prima facie* evidence of the title of ownership. Transfer of possession is one of the chief modes of transferring ownership. The first possession of a thing which as yet belongs to no one, is a good title of right. Possession is so important that a possessor may in many cases confer a good title on another even though he has none himself. If a property is already owned, its wrongful possession is a good title for the wrongdoer as against all the world except the true owner.

In *Hannah v. Peel*, the plaintiff was serving in the Royal Artillery. He was stationed in a house requisitioned by the government and he accidentally found a brooch in an upstairs room occupied by him. The brooch was handed over to the police. The police were not able to find out the rightful owner and delivered it to the defendant who was the owner of the house. The defendant sold the jewel for £ 66. A suit was brought for recovery of the brooch or its jewel. The plaintiff claimed the jewel as the finder. The contention of the defendant was that he was entitled to it as the owner of the property on which it was found. The defendant was never in possession of the house and had no knowledge of the brooch until it was brought to his notice. It was held that the defendant had neither *de facto* control nor the *animus* of excluding others and as such had no possession. The plaintiff was entitled to the brooch or its value since his claim as finder prevailed over all but the rightful owner [(1945) 2 All ER 288 : (1945) 1 KB 509].

In *Bridges v. Hawkesworth*, the plaintiff found a bundle of banknotes on the floor of a shop. The notes had been dropped there by a stranger by accident. The party who lost them could not be found. It was held that the plaintiff as the finder had property in the notes as against everyone but the true owner. The defendant had no prior possession which could prevail over the claim of the plaintiff. About this case, Salmond says that the shopkeeper (defendant) had not the requisite *animus* for possession. Pollock is of the view that *corpus possessionis* was itself lacking as the shopkeeper had no *de facto* control. Goodhart and Glanville Williams are of the opinion that this case was wrongly decided. The shopkeeper had a general *animus* and sufficient control requisite for legal possession as the thing was in his shop. (1851) 21 LJQB 75.

In *South Staffordshire Water Co. v. Sharman*, the defendant was cleaning out a pool of water on their land under the orders of the plaintiffs and he found two rings. He declined to deliver them to the plaintiffs but failed to discover the true owner. An action was brought for the recovery of the ring. It was held that the plaintiffs were entitled to the rings. Lord Russell of Killowen C.J. observed: "Where a person has possession of a house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in uno*." It is contended that the possession of land may not necessarily confer possession of all chattels attached to or under the land. To have possession of the chattel, the *corpus* and the *animus possidendi* should co-exist. If a chattel is unattached and lying loose upon the land, it is more than doubtful whether possession can be claimed by the owner of the land without showing that he had the necessary *animus* and *corpus possessionis* with reference to the chattel [(1896) 2 QB 44].

In *Merry v. Green*, the plaintiff purchased a bureau at an auction and got possession of it. In a secret drawer, there was money belonging to the vendor. As the plaintiff had no *animus* in regard to that money when he took possession from the vendor, he did not acquire possession of it. The possession of the vendor was continuing in the eye of law as to the money in the secret drawer. The plaintiff subsequently found the money and appropriated it. In doing so, he was depriving the vendor unlawfully and without his consent of possession which in law was still with him. It was held that the plaintiff had committed the offence of larceny or theft by appropriating the money [(1841) 7 M and W 623].

In *Akumella Panchayat Board v. Venkata Reddi*, a public latrine was under the control of the Panchayat Board. While carrying out certain repairs, the Board was obstructed by the defendant who had no title to the latrine. It was held that the Panchayat Board were entitled to a declaration of their possession and an injunction restraining the trespasser from interfering with the work of the Board in carrying out the repairs. The fact that the Panchayat Board had no legal title to the site on which the latrine stood, was

immaterial as the defendant himself was not the owner of that site. [(1945) 2 MLJ 176].

### *Development of the Concept of Possession*

As in the case of ownership, the concept of possession also has grown gradually in the course of many centuries. As civilization began to progress, the people started taking possession of certain objects and thus the idea of ownership began to grow. The struggle for existence was so bitter that individuals began to take possession of certain objects and considered them as their own. They began to take pride in the possession of those things and were not prepared to allow outsiders to interfere with them. They were determined to exercise continuous control to the exclusion of all others. From a humble beginning, the concept of possession and ownership began to grow and much progress has been made in this connection.

A distinction has to be made between *jus possessionis* or the right of possession and *jus possidendi* or the right to possess. *Jus possessionis* is the right of the possessor to continue to possess. It is a right to remain in possession except against a person who has a better title. Even a robber has the right of possession and only the true owner can interfere with his possession. If I give something to my servant to be kept in custody on my behalf, he has physical possession of the thing but he has no legal right to it. He has the *jus possessionis* and not *jus possidendi*. This is due to the fact that my servant has merely the *corpus* of possession and not the *animus* or the intention of exercising control over it.

### *Possession in Fact and in Law*

Possession is divided into two categories, viz, possession in fact and possession in law. Possession in fact is actual or physical possession. It is a physical relation to a thing. Possession in law means possession in the eye of law. It means a possession which is recognised and protected by law. There is sometimes a discrepancy between possession in fact and possession in law, although usually possession exists both in fact and in law in the same person. A person who is in *de facto* possession of a thing also comes to have *de jure* possession.

However, sometimes possession may exist in fact and not in law. If a servant holds certain things in his custody on behalf

of the master, he has the actual possession of those things but in the eye of law, the possession is with the master. In certain cases, possession may exist in law and not in fact. This is so in the case of constructive possession. A tenant may be occupying a particular building but the landlord has the constructive possession of the same. The same is the case with the things in the possession of servants, agents and bailees.

The fundamental element both in possession in fact and in law is the same. That element is the possibility of excluding every person other than the possessor from the use or control of the thing. According to Keeton "Possession in law and possession in fact are not invariably coterminous, although very frequently they are."

The Roman lawyers made a distinction between possession in fact as *possessio naturalis* and possession in law as *possessio civilis*. In consequence of this divergence, partly intentional and avowed and partly accidental and unavowed, between the law and the fact of possession, it is impossible that any abstract theory should completely harmonise with the detailed rules to be found in any concrete body of law. Such harmony would be possible only in a legal system which had developed with absolute logical rigour, undisturbed by historical accidents and unaffected by any of those special considerations which in all parts of the law prevent the inflexible and consistent recognition of general principles.

### *Elements of Possession*

There are two elements of possession and those are the *corpus* of possession and *animus* or the intention to hold possession. The two elements must be present in the case of possession and neither of them alone is sufficient to constitute possession. According to Holland, "A moment's reflection must show that possession in any sense of the term must imply firstly some actual power over the object possessed and secondly some amount of will to avail oneself of that power. Neither the mere wish to catch a bird which is out of my reach nor the mere power which I have without the least notion of exercising it, to seize a horse which I find standing at a shop door, will suffice to put me in possession of the bird or the horse. The Romans by whom this topic was treated with great fullness or subtlety describe these essential elements of possession by the terms *corpus* and *animus* respectively."

*Corpus of Possession*

By corpus is meant that there exists such physical power or physical contact of the possessor in relation to the thing possessed so as to give rise to the reasonable assumption that other people will not interfere with it. The corpus of possession can be considered under two heads: the relation of the possessor to the other persons and the relation of the possessor to the thing possessed.

*Relation of the Possessor to Other Persons.*—When I possess a thing it means that others shall not interfere with the use of that thing. According to Pollock, the reality of *de facto* dominion is measured in inverse ratio to the chances of effective opposition. A person is in possession of a thing when the facts are such as to create a reasonable expectation that he will not be interfered with in the use of it. He must have some sort of security for the acquiescence and not interference by other persons. The security for non-interference may vary from a mere chance to moral certainty. The measure of security is that which normally and reasonably satisfies the *animus domini*. The following are the sources from which such measure of security can be derived:

- (1) The first source is the physical power of the possessor. I am in possession when I lock up my money in a safe and thus realise my *animus possidendi*. Writers like Savigny are of the view that possession means an intention coupled with the physical power to exclude all persons from the use of that material object. But I may own a farm hundreds of miles away or I may inherit a fortune during my infancy and may not be in a position to prevent trespass or misuse of my fortune and yet I am in possession of the same. The assumption of physical power to exclude aliens is no better than a fiction. The true test is not the physical power of preventing interference but the improbability from interference from whatever source it may arise.
- (2) Another source is the personal presence of the possessor. The physical power of the possessor and the personal presence of the possessor, though they commonly coincide, are not necessary. The respect shown to the person of a man will commonly extend to all things claimed by him that are in his immediate presence.



Presence itself is protection. Bolts, bars and stone walls will give me the physical power of exclusion without any personal presence on my part. There may also be personal presence without any real power of exclusion. A little child has no physical power as against a grown-up man, yet it possesses the money in its hands. A dying man may retain or acquire possession by his personal presence but not by any physical power left in him.

- (3) Another measure of security may be secrecy. If a man wants to keep a thing safe from others, he may hide it. In that case, he will gain a reasonable guarantee of enjoyment which is just as effectively in possession of the thing as a strong armed man keeps his goods in peace.
- (4) Another measure of security is custom. There is a tendency among human beings to acquiesce in established usage and this is an important source of *de facto* security and possession. If I ploughed and sowed and reaped the harvest of a field last year and the year before, then unless there is something to the contrary I can reasonably expect to do it again this year and I am in possession of the field.
- (5) Another measure of security is respect for rightful claim. Rightfulness of the claim or rather a public conviction of its rightfulness is an important element in the acquisition of possession. A rightful claim will readily obtain that general acquiescence which is essential to *de facto* security. A wrongful claim will not be respected. The two forms of security, *de facto* and *de jure*, tend to coincide. Possession tends to draw ownership after it and ownership attracts possession. An owner will possess his property on much easier terms than those on which a thief will possess his plunder.
- (6) Another measure of security is the manifestation of the *animus domini*. The visibility of the claim is another element in the *de facto* security of its enjoyment. A manifested intent is much more likely to obtain the security of general acquiescence than on which it has

never assumed a visible form. Open use of a thing carries with it a *prima facie* rightmindedness with it.

- (7) Another measure of security is the protection afforded by the possession of other things. The possession of a thing tends to confer possession of any other thing that is connected with it or accessory to it. The possession of land confers a measure of security regarding the possession of chattels situated upon it. The possession of a house may confer possession of chattels inside it. The proposition that the possession of land necessarily confers possession of all chattels that are on or under it does not appear to be true. Whether the possession of one thing necessarily carries with it the possession of another depends upon the circumstances of each case. In the case of cattle straying on the land of neighbours, the owner of the land has neither the *animus* nor the *corpus* to possess it. A man effectually gives delivery of a load of bricks by depositing them on my land even in my absence, but he could not deliver a roll of bank notes by laying them upon my doorsteps

The view of Pollock and Wright is that the possession of land carries with it in general possession of everything which is attached to or under the land. The defendant employed by the company to clean a pond upon their land found certain gold rings at the bottom. It was held that the company, and not the defendant, had the first possession of it. The defendant lessee company discovered a pre-historic boat six feet below the surface of the land while excavating it for the purpose of erecting gas works. It was held that the lessor and not the lessee had first possession of the boat

In *Bridges v Hawkesworth*, a parcel of bank notes dropped by another person on the floor of the shop of the defendant was found by the plaintiff-customer. It was held that the plaintiff had a good title to it and not the defendant. (1851) 21 LJQB 75.

In *N.N. Muzumdar v. State*, it was held that corpus without the animus is ineffective. (AIR 1951 Cal 140).

*Relation of possessor to the thing possessed.*—The second element in the *corpus possessionis* is the relation of the possessor to the thing

possessed. All that is necessary is that the possessor must have the physical power of dealing with the thing exclusively as his own. Savigny writes : "The physical power of dealing with the subject immediately and of excluding any foreign agency over it is the factum which must exist in every acquisition of possession. This minimum physical power is not necessary to continue the possession as was required to give rise to it and continuing possession depends rather on the constant powers of reproducing the original relationship at will. For this reason, we do not lose possession by mere absence from the subject which we have once appropriated to ourselves, although the physical relation in which we now stand to it would not have sufficed in the first instance to obtain possession." Markby observes : "Corporeal contact is not the physical element which is involved in the conception of possession. It is rather the possibility of dealing with a thing as we like and of excluding others. If we consider the various modes in which possession is gained and lost, we shall recognise this very clearly."

I put some money in a box and lock up the same with the key. Although I have no physical contact with the box, the box is in my possession as the key of the box is in my possession. A person has some money in his pocket and some of it is dropped on the road. He continues to be the possessor of the money fallen on the road till the same is picked up by somebody else. When a person gives a dinner, his silver forks while in the hands of his guests are still in his possession. In the case of tamed animals like a cow, a dog, a horse, a bullock, etc., the owner does not lose his possession even if he loses physical control over them. A master may be away but he still maintains his possession of his dog or horse. In the case of wild animals like fish, bird and other animals which are *ferae naturae*, if the owner loses physical contact with them, he also loses their possession. They become the property of the person who captures them. In the case of India, if a bull is set free, according to Hindu usage, he is not the property of any individual and no person can be guilty of theft. However, it has been held in certain cases that if a bull is dedicated to an idol and allowed to move about at will, the trustee of the temple is in possession of that bull. The fish in a creek or in an open irrigation tank are not in the possession of the person who has right of fishery. They become the possession

of the person who catches them. However, the fish in a closed tank are in the possession of the owner of the tank.

### *Animus Possidendi*

*Animus possidendi* or the subjective element in possession is the intent to appropriate to oneself the exclusive use of the thing possessed. The *animus possidendi* is the conscious intention of the individual to exclude others from the control of an object. Markby writes: "In order to constitute possession in a legal sense, there must exist not only the physical power to deal with the thing as we like and to exclude others, but also the determination to exercise that physical power on our own behalf." The view of Savigny is that "every case of possession is formed on the state of consciousness of unlimited physical power". Holland observes: "To some possibility of physical control, there must, at any rate for the commencement of possession, be superadded a will to exercise such control." Kant says: "There must be the empirical fact of taking possession *apprehensio* conjoined with the will to have an external object one's own."

There are certain aspects of *animus possidendi* which have to be considered

- (1) The *animus possidendi* is not necessarily a claim of right. It may be consciously wrongful. The thief has a possession no less real than that of the true owner.
- (2) The claim of the possessor must be exclusive. He must intend to exclude other persons from the use of the thing possessed. A mere intent or claim of use cannot amount to the possession of the material thing itself. However, the exclusion need not be absolute. One may possess his land notwithstanding the fact that some other person or the public at large possess a right of way over it. Subject to this right of way, the *animus possidendi* is still a claim to the exclusive use or control of the land.
- (3) The *animus domini* need not amount to a claim or intent to use the thing as owner. A tenant or borrower may have possession. Any degree or form of intended use or control, however limited in extent or in duration, may, if exclusive for the time being, be sufficient to

constitute possession. The *animus possidendi* need not be a claim to the use of the thing at all as in the case of a pledge or a bailee with a lien.

- (4) The *animus possidendi* need not be a claim on one's own behalf. A servant, agent of trustee, may have true possession though he claims the exclusive use or control of the thing on behalf of another.
- (5) The *animus possidendi* need not be specified but may be merely general. A general intent with respect to a class of things is sufficient (if coupled with the necessary physical relation) to confer possession of the individual object belonging to that class even though their individual exercise is unknown. A fisherman is in possession of all the fish secured in his net. Likewise, I possess all the books in my library even though I may have forgotten the existence of many of them.

It may be thought that when a person has possession of a receptacle such as a box, a cabinet or envelope, his possession of the receptacle gives him possession of its contents.

### *Savigny's Theory of Possession*

According to Savigny, both the *corpus* of possession and the *animus possidendi* must be present to constitute possession. As regards the *corpus* of possession, it is necessary that in every acquisition of possession there must exist in the possessor a physical power of dealing with the subject immediately and of excluding others. When the possession of a thing has been acquired and that possession is intended to be continued, the possessor must have the ability to bring forth physical power to exclude others if they try to interfere with him in any way. However, immediate physical power of the possessor over the thing is not necessary.

As regards the second element, Savigny remarks thus: "*Animus possidendi* must be explained by *animus domini* or *animus sibi habendi*, and he only is to be looked on as in possession who deals as owner with the subject of which he has the detention. That is to say, he must contemplate dealing with it practically just as an owner is accustomed to do by virtue of his right and

consequently not as one recognizing anybody better entitled than himself."

Critics point out that there are certain shortcomings in the theory of possession of Savigny. Possession is one conception and there are no separate aspects of it with regard to its acquisition and possession. But it can be pointed out that the acquisition of possession differs from its continuance. Reasonable expectation of non-interference by others is essential for the acquisition of possession and not for its continuance. *X* snatches away the book of *T*. *X* does not acquire the possession of the book as *T* or anybody else may snatch away the same from him. He comes to have possession when there is expectation of non-interference.

Moreover, physical power to exclude others is not essential to the concept of possession. It is not always possible to exclude others. It is not always necessary to exclude others whether in acquiring or retaining possession. This is due to the fact that there are certain objects which cannot be physically possessed. This is particularly so in the case of incorporeal possession. I may have the right of way over the land of another person but this does not mean that I have physical possession of the same. Thus, *the theory of Savigny does not apply to incorporeal possession*. A child or a weak person has not the power to exclude others from possession as the other parties are physically stronger. Moreover the same thing may be possessed by many persons at the same time. In the case of joint possession, the possession by one party cannot be exclusive.

About Savigny's theory, Lightwood points out that the requirements of a power to exclude foreign agency goes too far. To quote him: "It is the absence and improbability of foreign interference that constitutes the physical element and not the existence of any power of exclusion." Salmond points out that a little child may have no physical power as against a strong man and may yet possess the money in its hand. The view of Savigny that the *corpus possessionis* is of two kinds according as it relates to the acquisition or the retention of possession, is criticized by Salmond and Holmes. Salmond contends that there is no reason why possession which represents a certain relation between a person

and a thing, should be one thing at its commencement and another in its continuance. The view of Holmes is that when once a right is acquired, there is no ground on which the law need hold that right at an end except in the clear manifestation of some fact inconsistent with its existence. On this principle, "it is only a question of tradition or policy whether a cessation of the power to reproduce the original physical relations shall affect the continuance of the rights." Possession may continue in law even if the ability to reproduce the physical power of exclusion does not exist.

According to Dias and Hughes, the theory of Savigny as an explanation of Roman law is demonstrably wrong. In the first place, Savigny overlooks the shift in the meaning of the word "possession". He seems to have fallen into the common fallacy that words must necessarily correspond to facts and hence his desire to find factual content for possession. Secondly, he based his statement of this factual content on the utterances of Paul, the jurist. Academic speculation was never the strong point of the Romans and Paul was no exception to it. In the third place, it was erroneous to assume that *corpus* and *animus* which were only conditions sometimes required for the acquisition and loss of possession, constituted possession itself. Fourthly, Savigny's idea of *animus domini*, the intention to hold as owner, fails to explain the cases of the pledgee, Emphyteuta, Sequester and Precario, Tenens, who had possession but did not intend to hold at owners. He first condemned them as anomalous, hinted at "historical reasons" and then suggested that they were cases of "derivative possession" or possession derived from the owner. The view of Savigny that the temporary loss of one ingredient of possession did not matter provided there was the ability to reproduce it at will, is also inconsistent with the texts. It does not explain the continued possession of a fugitive slave despite the owner's inability to reproduce the *corpus* element at all. The only conclusion is that the theory of Savigny completely misrepresents Roman law.

It is not necessary that the possessor must intend to use the thing as owner. It is also not necessary that he should recognize no one as having a better title to the thing than himself. A bailee recognizes the title of the owner but he has still the

possession of the thing. The same is the case with the hirer of an article or a pawnee or a pledgee. Thus, Savigny's theory of possession is not accepted in modern times.

It is generally agreed that Ihering was able to demolish the theory of Savigny. He approached the idea of possession as a sociologist. He tried to answer the question as to why Roman law protected possession by means of interdicts. His view was that interdicts were devised to benefit owners by protecting their holding of property and so placing them in the advantageous position of defendants in any action as to title. Persons who held property would in the majority of cases be owners and possession was attributed to such persons in order to make interdicts available to them. The view of Ihering was that whenever a person looked like an owner in relation to a thing he had possession of it unless possession was denied to him by rules of law based on practical convenience. The *animus* element was simply an intelligent awareness of the situation.

Critics point out that the view of Ihering is unduly coloured by the angle of his approach, i.e., the interdicts. The special reasons of policy that lay behind the interdicts require that the person in control should be protected. To that extent the idea of possession for purposes of interdicts had a factual basis. The shift in the meaning of possession occurred outside that sphere and their factual basis ceased to be true. The view of Ihering seems appropriate as an explanation of interdictal possession. But as a general description of possession, it is needlessly narrow. However, it is infinitely superior to the view of Savigny.

The view of Markby is that possession is "the determination to exercise physical control over a thing on one's own behalf coupled with the capacity to do so". This definition is criticised on the ground that it puts emphasis on the *animus* or the mental element of possession and ignores the *corpus* or the objective part. It applies only to material objects and not to incorporeal objects or rights. Moreover, the capacity to exercise physical control is not absolutely necessary to acquire possession.

Holmes who started by refuting *a priori* philosophical ideas, perceived that less facts are required to initiate possession than to



acquire it. What constitutes possession can be best studied only when possession is first gained. Accordingly, he pointed out that "to gain possession, then a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent. These relations and this intent are the facts of which we are in search" Holmes suggested that English law does not require the *animus domini* element, but merely the intent to exclude others. For instance, the tenant desires not to hold as owner of the land but only to exclude the landlord.

According to Salmond "The possession of a material object is the continuing exercise of a claim to the exclusive use of it." Again, "it is a continuing *de facto* relation between a person and a thing which is known as possession". Possession is a relation of fact and not one of right. It may be, and commonly is, a title of right, but it is not a right itself. Possession is the *de facto* relation between the possessor and the thing possessed.

Critics point out that the view of Salmond is not correct. Holland says that a right is "the capacity residing in a person of controlling with the assent and assistance of the State, the action of others".

Pollock has given his own view of possession. According to him "In common speech, a man is said to possess or to be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others" Pollock lays stress not on animus but on *de facto* control which he defines as physical control. A general intent is sufficient. The reduction of possession to a general criterion such as *de facto* control has led Pollock to face certain difficulties. His theory does not explain how servants have custody for some purposes and possession for others. Physical control to exclude others might be an important factor in a primitive and lawless society but the more settled the community is, the less important is actual physical power in the acquisition of possession. A child has not the physical power to exclude the ruffian but he still has possession unless the ruffian actually takes it away from him.

It is clear from the above theories of possession that in English law emphasis is laid on animus or intent. The intent which constitutes possession is the intent to exclude others. According

to Holmes. "Such an intent is all that the common law deems needful and that on principle no more should be required." Shartel writes: "I want to make the point that there are many meanings of the word possession, that possession can only be usefully defined with reference to the purpose in hand and that possession may have one meaning in one connection and another meaning in another."

Salmond writes: "Of all divergences between legal and actual possession, this is the most notable, viz., that outside the law, possession is used in an absolute sense, whereas within the law it is employed in a relative sense. Outside the law, we do not speak of a person having possession as against someone else; we say that he either has or has not got possession. In law we talk rather of possession as something which one person has against another."

### *Methods of Transfer of Possession*

Transfer or acquisition of possession can be done in three ways, viz., by taking, by delivery and by the operation of law.

(1) As regards the acquisition or transfer of possession by *taking*, it is done without the consent of the previous possessor. This also may be done in two ways. One is called the rightful taking of possession and the other the wrongful taking of possession. A shopkeeper is entitled to get some money from a customer and the shopkeeper takes possession of the things of the customer. This is an example of the rightful taking of possession. If a thief steals something from an individual, his acquisition of possession is wrongful. However, if a person captures a wild animal which does not belong to anybody, the possession is called original.

(2) Another way of acquisition of possession is by *delivery* or *traditio*. In such a case, a thing is acquired with the consent and cooperation of the previous possessor. Delivery is of two kinds, viz., actual and constructive. In the case of actual delivery immediate possession is given to the transferee. There are two categories of actual delivery. According to one category, the holder retains mediate possession and according to the other the holder does not retain mediate possession. If I lend a book to

somebody I retain the mediate possession of the book but if I sell the same, I do not retain any mediate possession.

*Constructive delivery* is that which is not direct or actual. There are certain things which cannot actually be transferred by the owner to the purchaser or by the transferor to the transferee. In such cases, constructive delivery alone is possible. There are three kinds of constructive delivery and those are *traditio brevi manu*, *constitutum possessorium* and *attornment*. In the case of *traditio brevi manu*, possession is surrendered to one who has already immediate possession. In such a case, it is only the *animus* that is transferred as the *corpus* of possession is already with the transferee. I have already lent a book to somebody, if I sell the same book to him, it is a case of *traditio brevi manu*. In the case of *constitutum possessorium* it is only the mediate possession that is transferred and the immediate possession is retained by the transferor. I may sell my car to somebody but I may retain the physical possession of the same for some time in spite of the payment of price to me. In such a case, the *animus* is lost and I keep the car on behalf of the purchaser. It is to be observed that in all cases of constructive delivery, there is a change of *animus* alone and *corpus* of possession remains where it was before

(3) Transfer of possession can be made by the *operation of law* as well. This happens when, as a result of law, possession changes hands. If a person dies, the possession of his property, is transferred to his successors and legal representatives.

*Res nullius*: According to this principle, the first finder of a thing has a good title to that thing against all but the true owner. It is immaterial if the thing is found on the property of another person. However, there are certain exceptions to this general rule. The rule does not apply if the owner of the property on which the thing is found is in possession of the thing itself and the property. The same is the case if the finder finds the thing as the servant or agent of another person. The rule also does not apply if the possession of the thing was got through trespass or other wrongful act.

X wounds a hare in the forest and Y catches it on his own field. Y has the better right to the animal. A parcel of bank

notes is found by *X*, a customer, at the floor of the shop of *Y*. *Y* had no knowledge of the existence of those bank notes. *X* acquires a better title to the bank notes as the first possessor than *Y*. As the shopkeeper was not aware of the existence of the bank notes, he could not be presumed to be in their possession. In another case, a bank note was dropped in the shop of *X*. The shopkeeper picked up the note and although he knew the owner of that note, he did not return the same and converted it to his own use. He was held guilty of theft. In another case, it was held that the first finder did not become the owner as he was merely an agent. In still another case, it was held that the finder did not become the owner as his action of removing the boat was a trespass.

### *Kinds of Possession*

(1) *Immediate and Mediate*. Immediate possession is also called direct possession and mediate possession is also known as indirect possession. If the relation between the possessor and the thing possessed is a direct one, it is a case of immediate possession. When that relation is through the intervention or agency of some other person, it is called mediate possession. If I go to the bazar and buy a thing personally, it is a case of immediate possession. If I send an agent to the bazar to buy something and he does make the purchase, his possession is mediate and the possession of the agent is mediate. When the agent hands over the thing to me, my possession also becomes immediate.

There are three categories of mediate possession. In the case of the first category, the owner has possession through an agent or servant who acquires and retains possession of a thing entirely on behalf of the owner without claiming any interest for himself. I send my servant to the bazar on a bicycle to buy for me a pair of socks. In this case, I have mediate possession of the bicycle and the socks. Likewise, if I deposit certain goods in a warehouse or in a store, the latter holds those goods on my behalf and I retain their mediate possession. In the second case, the immediate possession is with a person who holds the thing on his own behalf and on my behalf and who is bound to hand over the direct possession of the same whenever I desire. This is the case of a hirer, tenant at will or a borrower. They all recognise the superior

title of another person. In the case of third category, the immediate possession is with one person but he is bound to return the same after a certain period or on the fulfilment of certain conditions. If I owe some money to somebody and pledge certain things to my creditor, the pledgee has immediate possession of the thing pledged but is bound to return the same to the pledgor on the payment of the debt

The threefold classification of mediate possession has been criticised by certain writers. It is pointed out that in the case of an agent or servant, he does not possess the thing but has merely the custody of the thing. The *animus possidendi* is lacking. Even if a thing is given to a servant for sale, he merely acquires the custody of the thing in possession. The reason is that if he had immediate possession of the thing, he could not be held guilty of theft in case of misappropriation. It is also pointed out that it is the bailee and not the bailor who can sue for interference with the possession of the bailee. It is the bailee who has the possession and not the bailor. In the case of a bailee at will, both the bailor and the bailee have possession of the thing and both of them can sue for interference with their possession.

It is also pointed out that two persons cannot be in possession of the same thing at the same time adversely to each other. The reason is that if one person has both the *corpus* of possession and the *animus possidendi*, he has full possession of the thing and no other person can have possession to the same thing. The case is different in the case of co-owners. They are joint owners and neither of the two has any right to exclude the other. In the case of bailment at will, the bailor and bailee are both in possession of the same thing at the same time

(2) *Corporeal and Incorporeal*: Corporeal possession is the possession of a material object and incorporeal possession is the possession of anything other than a material object. I have corporeal possession of my car and books, but I have incorporeal possession of a trade mark, a patent and a copyright. Corporeal possession is the possession of a thing and incorporeal possession is the possession of a right. According to the Italian Civil Code: "possession is the detention of a thing or the enjoyment of a right by any person either personally or through another who retains

the thing or exercises the right in his name." According to Burns : "Just as corporeal possession consists not in actual dealing with the thing but only in the power of dealing with it at will, so incorporeal possession consists not in the actual exercise of a right but in the power of exercising it at will, and it is only because the existence of this power does not become visible as an objective fact until actual exercise of the right has taken place that such actual exercise is recognised as an essential condition of the commencement of possession "

(3) *Representative possession*. Representative possession is that in which the owner has possession of a thing through an agent or a servant. The real possession is that of the actual owner and not that of the representative I put some money in the pocket of my servant to buy certain things from the bazar. Money in the pocket of the servant is not in his possession It is a case of representative possession. The essence of representative possession lies in the fact that the master has the *animus* to exercise control over the thing in the hands of his servant or agent

(4) *Concurrent possession* : In the case of concurrent possession, the possession of a thing may be in the hands of two or more persons at the same time Claims which are not adverse and which are not mutually destructive, admit of concurrent realisation In the case of concurrent possession, mediate and immediate possession may exist in respect of the same thing. The possession of my servant over a thing of mine may be immediate but my mediate possession is also there. Two or more persons may possess the same thing jointly. Corporeal or incorporeal possession may exist with regard to the same material thing I may possess a piece of land and another person may have the right of way on the same land.

(5) *Derivative possession* : In the case of derivative possession, the holder of the thing combines in himself both the physical and mental elements which constitute legal possession A creditor has a derivative possession of the thing pledged to him. Likewise, a watchmaker has a derivative possession of a watch entrusted to him for repairs so long as the repair charges are not paid. A bailee has a derivative possession of the goods bailed to him. In these cases, the title of the holder of the thing is derived from the

person who entrusts the thing. It is pointed out that if the owner of the watch takes away the watch forcibly without making the payment, he is guilty of theft.

(6) *Constructive possession*: Constructive possession is not actual possession. It is a possession in law and not possession in fact. The goods sold by me are lying in a warehouse and if I hand over the keys of the warehouse to the purchaser, the latter comes to have the constructive possession of the thing. If I hand over the key of a building to a tenant, I give constructive possession of the building to the tenant. The handing over of the key shows that possession has changed in law although not in fact.

(7) *Adverse possession*: The possession of property by a person is adverse to every other person having or claiming to have a right to the possession of that property by virtue of a different title. To be adverse, possession must be an invasion of the ownership of another. It should be actual, exclusive and adequate in continuity and publicity. The acts of possession must be exercised without violence, without stealth and without permission. When these conditions are present, possession is considered to be adverse. The conception of adverse possession is very important in law because when it is had for the period laid down by law, it extinguishes the title of the true owner and creates a title in the adverse possessor.

(8) *Duplicate possession*. Possession is a right to exclusive use and it is not possible for two persons to have independent and adverse claims to possession of the same thing at the same time. The possession of a thing by one person is compatible with its possession by another only when the two claims are not mutually adverse. Claims to possession which admit of concurrent realisation give rise to duplicate possession.

The possession of co-owners is a case of duplicate possession and is usually called *compossessio*.

Corporeal and incorporeal possession may coexist in respect of the same object. One person may possess a land and another person can have a right of way over that land. This is another illustration of duplicate possession.

The most important case of duplicate possession is what is

called by Salmond as mediate and immediate possession. Possession may be held on account of someone else. The person for whom possession is held has mediate possession of property while the person holding the thing directly has immediate possession. Examples of duplicate possession are furnished by the possession of landlord and tenant, bailor and bailee and master and servant. The tenant, the bailee and the servant have immediate possession. They recognise the right to possession of the landlord. The landlord and the bailor have mediate possession which avails against all the world except the immediate possessor. The servant can claim no interest of his own and holds solely for his master. The possession of the master is mediate possession and avails even against the immediate possessor.

### *Why possession is protected?*

There are many reasons for the protection of possession.

(1) Protection of possession aids the criminal law by preserving the peace. According to Savigny, the protection of possession is a branch of protection to the person. Possession is protected in order to obviate unlawful acts of violence against the person in possession. Interference with possession inevitably leads to disturbance of peace. Order is best secured by protecting a possessor and leaving the true owner to seek his remedy in a court of law. Justice Holmes writes: "Law must found itself on actual facts. It is quite enough therefore for the law that man, by an instinct which he shares with the domestic dog and of which the seal gives the most striking example, will not allow himself to be dispossessed either by force or by fraud, of which he holds, without trying to get it back again. To obviate the violence resulting from this, possession is protected by the law."

According to Ihering, possession is ownership on the defensive. The possessor must be protected and he must not be asked to prove his title. Most of the possessors are the rightful owners and it is desirable that they should be protected. Possession is the evidence of ownership. Possession is patent to all. Possession is the nine points of law and hence protection should be given to possession.

According to Holland. "The predominant motive was probably a regard for the preservation of the peace." The view



of Windschield is that protection to possession is given in the same way as protection is given against *injuria* or the violation of a legal private right.

(2) Possession is protected as a part of the law of tort. Law protects possession not only from disturbance by force but from disturbance by fraud. The protection thus afforded is a part of the law of tort.

(3) According to the philosophical school of jurists, possession is protected because a man by taking possession of an object has brought it within the sphere of his will. The freedom of the will is the essence of personality and has to be protected so long as it does not conflict with the universal will which is the State. As possession involves an extension of personality over the object, it is protected by law. As the reputation of a person is protected against defamatory attack, his possession is protected as he has projected his personality over the object of possession.

Kant says that men are born free and equal. Freedom of will is the essence of man and it must be recognised, respected, protected and realised by all governments. Possession is the embodiment of the will of man. By taking possession of a thing, a person incorporates his will and personality in that thing. Possession is the objective realisation of free will and the will of a person as expressed in possession must be protected. Puchta writes: "The will which wills itself, that is, the recognition of its own personality, is to be protected." The view of Gans is that "the will is of itself a substantial thing to be protected and this individual will has only to yield to the higher common will."

(4) Possession is protected as a part of the law of property. Cairns writes: "Possession was originally protected to aid the Law of Crime and Tort; it came at length to be protected in order to aid the law of property." (*The Social Sciences*, p. 65). In the early stages of the development of the law of property when proof of title to property was difficult, it was considered to be unjust to cast on a person whose possession was disturbed the burden of proving a flawless title. Therefore, the law presumed that the possessor was the owner until a superior title was shown to exist in someone else. In this way, possession came to be protected by law.

The view of Salmond is that distinct possessory remedies are not required and the punishments of criminal law and the sanctions of the Law of Tort are sufficient to prevent the evils of violent self-help. An owner who has dispossessed a trespasser need not be required to deliver possession to the trespasser and recover it back in an independent proprietary action. As for assistance rendered to the law of property, the modern law of evidence can adjust the burden of proof suitably and avoid the duplication of proprietary and possessory remedies. While these considerations are entitled to great weight, expediency requires that possession as such must be protected. In India, a compromise has been made between proprietary and possessory remedies. If the dispossessed owner brings his suit promptly within six months, he is allowed to succeed merely on proof of possession even against the true owner. If he brings his suit beyond that period, he is non-suited if the defendant proves a superior title in himself.

### *Possessory Remedies*

Possessory remedies are those which exist for the protection of possession even against ownership. Proprietary remedies are those which are available for the protection of ownership. In many legal systems, possession is provisional or temporary title even against the true owner. Even a wrongful possessor who is deprived of his possession can recover it from any person whatsoever on the ground of his possession. Even the true owner who retakes his own, must first restore possession to the wrongdoer and then proceed to secure possession on the ground of his ownership.

There are many reasons why possessory remedies are recognised.

(1) Possession often amounts to evidence of ownership. A finder of goods becomes its owner against the whole world except the true owner. This is on the ground that he is in possession of it. If a person is in adverse possession of a property for 12 or more years, he becomes the legal owner of that property and the right of the original owner is extinguished.

(2) The evils of violent self-help are very serious and in all civilised countries, those are prohibited. Experience shows that there can be better conditions in society if the use of force is

avoided by the real owners. Lawful methods are always to be preferred and no one should take the law into his own hands.

(3) Another reason for possessory remedies is to be found in the serious imperfection of early proprietary remedies. Those were cumbersome, dilatory and inefficient. Every claimant had to undergo many hardships. The position of the plaintiff was a very difficult one and no person was to be allowed to occupy the advantageous position of the defendant. It was under these circumstances that it was provided that the original state of affairs must be restored first. Possession must be given to him who had it first and then alone the claims of the various persons could be settled. Under the old legal systems, it was extremely difficult to prove one's ownership and recover the property on the ground of title. Very often, small technicalities resulted in the defeat of one's title to property.

(4) Another reason for possessory remedies is that it is always more difficult to prove ownership than to prove possession. Hence it is unjust that a person who has taken possession of property by violence should not be allowed to transfer the heavy burden of proof from his own shoulders to that of his opponent. He who takes a thing by force must restore it and he is free to prove that he is the owner.

### *Possessory Remedies and Doctrine of Jus Tertii*

Possessory remedies have been rejected by English law but other provisions have been made to protect possession. There are three rules in this connection. Prior possession is *prima facie* proof of title. He who is in possession first in time has a better title than the one who has no possession. A defendant is always at liberty to rebut that presumption by proving that he has a better title. A defendant who has violated the possession of the plaintiff is not allowed to set up the defence of *jus tertii* which means that he cannot plead that though neither the plaintiff nor he has the title, some third person is the true owner but the plaintiff is not. This defence is not valid under English law as prior possession is always a *prima facie* proof of title. Though the title of a third person is not a good defence, English law considers *jus tertii* as a good defence under the following circumstances :

- (i) When the defendant defends the action on behalf of and by the authority of the true owner.
- (ii) When he committed the act complained of by the authority of the true owner.
- (iii) When he has already made satisfaction to the true owner by returning the property to him.

### **Distinction between Possession and Ownership**

According to Ihering: "Possession is the objective realisation of ownership." It is the external realisation of ownership. It is a valuable piece of evidence to show the existence of ownership. It is in fact what ownership is in right. It is the *de facto* exercise of a claim while ownership is the *de jure* recognition of that claim. Possession is the *de facto* counterpart of ownership. It is the external form in which rightful claims normally manifest themselves.

By ownership in law is meant the right of an individual or a body corporate or incorporate to possess a thing to the exclusive use of it, to alienate it, and even to destroy it in such a manner that he does not disturb the rights of other people. In the strict sense of the term, ownership is a right to the enjoyment of the uses of the subject matter, with a right to deal with it in any manner the owner pleases. It is not necessary that the owner of the corpus should enjoy all the rights or uses at the same time. He may either use it or keep it locked in the house. He may use it everyday or sparingly. He may exclude strangers or outsiders from using it. He may gift it away to anybody. He may even destroy it. His right is against the whole world. Nobody can disturb him in the peaceful enjoyment of the thing owned by him. In the case of incorporeal rights such as a copy-right, trade mark or patent, he can use all those rights to the exclusion of all others.

According to Austin, ownership in its wider sense is a right "indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration". The right of alienation of property is a necessary incident to the right of ownership, but there are many restrictions with regard to the alienation of property today.

According to Pollock: "Ownership may be described as the entirety of the powers of use and disposal allowed by law. The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often, there is no such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it, and he will be the owner even if the immediate power or control and user is elsewhere." According to Salmond, ownership in its widest sense implies "the relation between a person and any right that is vested in him".

According to Salmond, possession "is in fact what ownership is in right. Possession is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one. A thing is owned by me when my claim to it is maintained by the will of the State as expressed in the law; it is possessed by me when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts." Again, "possession, therefore, is the *de facto* counterpart of ownership. It is the external form in which rightful claims normally manifest themselves. The separation of these two things is an exceptional incident, due to accident, wrong or the special nature of the claims in question. Possession without ownership is the body of fact, uninformed by the spirit of right which usually accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realises itself. The two things stand mutually to coincide. Ownership strives to realise itself in possession and possession endeavours to justify itself as ownership. The law of prescription determines the process by which, through the influence of time, possession without title ripens into ownership, and ownership without possession withers away and dies."

Ownership and possession have the same subject matter. Whatever can be owned can also be possessed and whatever can be possessed can also be owned. However, there are certain claims which can be realised and exercised in fact without receiving any recognition or protection from law. There is no right vested either in the claimant or in anyone else. There is possession without ownership. Man may possess copyrights, trade marks and other forms of monopoly though law may refuse to

defend the same. There are many rights which can be owned but not possessed. There are transitory rights which do not admit of continuing exercise and possession. They cannot be possessed as they are destroyed after their fulfilment. A creditor does not possess a debt as it is a transitory right. However, a person can possess an easement over a piece of land as its continued existence is possible. A right *in rem* can both be owned and possessed but a right *in personam* can be owned but it cannot be possessed.

Possession and ownership differ in their mode of acquisition. The transfer of possession is comparatively easier and less technical, but the transfer of ownership in most cases involves a technical process of conveyancing.

The distinction between possession and ownership on the basis of fact and right is not tenable. Fact and right are not quite separate and independent ideas. One cannot exist without the other. To say that one is a fact and the other is a right is not correct. Though there may be a difference of degree, both the things (fact and right) are present in both the concepts.

### SUGGESTED READINGS

- |                     |   |   |
|---------------------|---|---|
| Bhalla, R. S.       | : | <i>The Institution of Property Legally, Historically and Philosophically Regarded</i> , Eastern Book Co. (1984) |
| Cheshire, G. C.     |   | <i>The Modern Law of Real Property</i> , Butterworths, 1976   |
| Crossley Vaines, J. |   | <i>Personal Property</i> , Butterworths, 1967.  |
| Denman, D. R.       |   | <i>Origins of Ownership</i> , Allen & Unwin Ltd, 1958   |
| Goodeve, L. A.      |   | <i>Modern Law of Personal Property</i> , Sweet and Maxwell, 1949.   |
| Goodhart, A. L.     | : | <i>Essays in Jurisprudence and the Common Law</i> .   |
| Hanson, A. H.       |   | <i>Parliament and Public Ownership</i> , Cassell and Company, 1961.   |
| Hargreaves, A. D.   | : | <i>An Introduction to the Principles of Land Law</i> , Sweet and Maxwell, 1963.                                 |
| Holland, T. E.      | . | <i>The Elements of Jurisprudence</i> , Oxford, 1924.  |
| Holmes, O. W.       |   | <i>The Common Law</i> , Boston, 1881.   |
| Keeton, G. W.       | . | <i>The Elementary Principles of Jurisprudence</i> , 1949.   |
| Kocourek, A.        |   | <i>Jural Relations</i> , 1928   |
| Lightwood, J. M.    | . | <i>A Treatise on Possession of Land</i> , Stevens and Sons, 1894.   |
| Lloyd, D.           | . | <i>The Idea of Law</i> , Penguin Books, 1964.   |

- Markby, W. : *Elements of Law*, Oxford, 1905.
- Noyes, C. R. : *The Institution of Property*, 1936.
- Paton, G. W. : *A Text Book of Jurisprudence*, Clarendon Press, Oxford, 1972.
- Pollock, F. : *A First Book of Jurisprudence*, Macmillan and Company, 1929.
- Pollock, F. and Wright, R. S. : *An Essay on Possession in the Common Law*, Oxford, 1888.
- Pollock and Maitland : *History of English Law*.
- Pound, R. : *Jurisprudence*, West Publishing Company, 1959.
- Salmond, J. W. : *Jurisprudence*, 1966.
- Savigny : *Possession*
- Stone, J. : *Social Dimensions of Law and Justice*, Stevens and Sons, 1966.
- Vinogradoff, P. : *Outlines of Historical Jurisprudence*, Oxford University Press, 1922.

## XV

### PERSONS

#### Definition

The word 'person' is derived from the Latin word '*persona*'. This term has a long history. To begin with, it simply meant a mask. Later on, it was used to denote the part played by a man in life. After that, it was used in the sense of the man who played the part. In later Roman law, the term became synonymous with *caput*. A slave had an imperfect *persona*. Last of all, the term is used in the sense of a being who is capable of sustaining rights and duties.

Many definitions of persons have been given by various writers. According to the German writers, "will is the essence of a personality. A legal person is one who is capable of will". Zitelmann writes: "Personality is the legal capacity of will. The bodiliness of men is for their personality a wholly irrelevant attribute." Meurer observes: "The juristic conception of the juristic person exhausts itself in the will and the so-called physical persons are for the law only juristic persons with a physical *superfluum*." Karlowa says: "The body is not merely the house in which the human personality dwells; it is together with the soul which now for this life is inseparably bound with it, the personality. So, not only as a being which has the possibility of willing, but as a being which can have manifold bodily and spiritual needs and interests as a human centre of interests, is a man, a person."

A person is not necessarily a human being. There may be human beings who are not persons. Slaves are not persons in the legal sense as they cannot have rights. In the same way, there may be persons who are not human beings, e.g., a corporation. According to Hindu law, idols are legal persons. Although they have a personality in the eye of law, they are not human beings



The term personality has a wider significance than humanity. Under the Indian Penal Code, the word person includes any company or association, or body of persons, whether incorporated or not.

According to Salmond: "A person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance and this is the exclusive point of view from which personality receives legal recognition "

### *Legal Status of Lower Animals*

The only natural persons are human beings and beasts are not persons, either natural or legal. They are merely things. They are often the objects of legal rights and duties, but never the subjects of them. Like men, beasts are capable of acts and possess interest, but their acts are neither lawful nor unlawful. They are not recognised by law as the appropriate subject matter either of permission or of prohibition.

A beast is as incapable of legal rights as of legal duties. His interests are not recognised by law. Law is made for men and allows no fellowship or bonds of obligation between men and lower animals. If they possess moral rights, those are not recognised by any legal system. If a beast is hurt, it is a wrong to the owner of the beast or the society of mankind but not to the beast. No animal can be the owner of any property, even through the medium of a human trustee. Even if a testator vests property in trustees for the maintenance of his favourite horses or dogs, he will not create thereby a valid trust enforceable in any way by or on behalf of these non-human beneficiaries. The only effect of such provisions is to authorise the trustees, if they think fit, to spend the property or any part of it in the way so indicated. Whatever part is not so spent will go to the representatives of the testator as undisposed of.

According to some writers, animals are persons. They point

out that "law prohibits cruelty towards them and English law enforces trusts of property in their favour, the obligations which the law enforces in these respects seem to co-relate with rights vested in the animals".

Keeton writes. "In Greek law, we hear of animals and trees being tried for offences to human beings, and obviously, therefore, they are considered capable of having duties, even if they possessed no rights. Even in the Middle Ages, trials of animals continued. In Germany, a cock was solemnly placed in the prisoner's box and was accused of contumacious crowing. Counsel for the defendant failed to establish the innocence of his feathered client and the unfortunate bird was accordingly ordered to be destroyed. In 1508 the caterpillars of Contes, in Provence, were tried and condemned for ravaging the fields, and in 1545 the Beetles of St. Julien de Maurienne were similarly indicted. So late as 1688, Gaspard Bailly of Chamberg in Savoy was able to publish a volume including forms of indictment and pleading in animal trials. In all these cases, the animal is considered to be capable of sustaining duties and is therefore to this extent a legal person. The same idea is reflected in Jewish law where it is provided that the ox that gores must not be eaten."

A charitable trust is for the advancement of human beings. Even a trust for the benefit of animals generally or a class of animals is void if it is to last for perpetuity. However, a trust created for the welfare of cats and kittens needing care and attention was held to be valid as it was meant to develop the emotions and the finer senses of human nature of which care of old and sick animals is a manifestation. Likewise, a trust for the welfare of animals such as cows, buffaloes etc. is a good charitable trust in so far as it leads to the advancement of religion.

However, there are two cases in which beasts may be thought to possess legal rights:

- (1) Cruelty to animals is a criminal offence.
- (2) A trust for the benefit of particular classes of animals, as opposed to one for individual animals, is valid and enforceable as a public and charitable trust, e.g., a

provision for the establishment and maintenance of a home for stray dogs or broken down horses.

The view of Salmond is that these duties towards animals are conceived by the law as duties towards society itself. They correspond not to private rights vested in the immediate beneficiaries but to public rights vested in the community at large. The community has a rightful interest in the well-being even of the dumb animals which belong to it. However, where the interests of animals conflict with those of human beings, the latter are preferred.

### *Legal Status of Dead Persons*

The personality of a human being commences its existence on birth and ceases to exist at death. Dead men are no longer persons in the eye of law. They have laid down their legal personality with their lives and they are destitute of rights and liabilities. They have no rights because they have no interests. They do not even remain the owners of their property until their successors enter upon their inheritance. The goods of an intestate before the grant of letters of administration were formerly vested in the Bishop of the Diocese. Now they are vested in England in the judge of the Court of Probate rather than left to the dead until they are acquired by the living.

Without conferring rights upon the dead, law recognises and takes account after the death of a person of his desires and interests when alive. There are three things in respect of which the anxieties of living men extend even after their death. Those are his body, his reputation and his estate. A living man is interested in the treatment to be given to his own dead body. A corpse is the property of no one. It cannot be disposed of by will or any other instrument and no wrongful dealing with it can amount to theft. However, criminal law secures a decent burial for all dead men and the violation of a grave is a criminal offence. The directions of a man in his will regarding the disposal of his dead body are without any binding force. However, by statute he is given the power of protecting it from the indignity of anatomical uses. A permanent trust for the maintenance of his

tomb is illegal and void as no property can be permanently devoted for this purpose. Even a temporary trust for this purpose is not obligatory as property is for the uses of the living and not of the dead.

The reputation of a dead person receives some degree of protection from criminal law. A libel upon a dead man is punished as a misdemeanour when its publication is an attack on the interests of living persons. As a matter of fact, this right is in reality not that of the dead person but of his living descendants.

In *Williams v Williams*, it was laid down that a person cannot during his lifetime make a will disposing of his body, e.g., giving his brain to the museum or giving any part of his body to the medical college. However, the trend is changing today and it is perfectly legal to donate one's eyes after death.

A person can, by his will or otherwise make a valid trust for the repair of all the graves in a graveyard because that would amount to a public or charitable trust, but one cannot make a trust for the perpetual repair of one's own grave or the graves of his ascendants and descendants because such a trust would be a private trust and would infringe the rule against perpetuity. Even if a bequest is for the benefit of one's soul or the souls of one's ancestors or descendants, that bequest is to be regarded as a public or charitable bequest because that is likely to advance the cause of religion by attracting other persons who are strangers to that particular place on the day or days on which such ceremonies are performed.

It has been held in *Jamshedji v. Soonabai* that *muklad* ceremonies of the Parsees tend to advance the religion of the followers of the Prophet Zoroaster and therefore trusts and bequests for the purpose of such ceremonies are valid (33 Bom 122).

In *Advocate-General v. Yusufali*, it was held that a gift for the perpetual upkeep of the tomb of St. Chandabhai was a charitable gift, and therefore valid, even though perpetual. (24 Bom LR 1060).

For years after a man is dead, his hand may continue to regulate and determine the enjoyment of the property which he owned while he was alive. The law of succession permits the desires of the dead to regulate the actions of the living. Moreover, whatever he has left behind to be distributed as gifts or given in charity will be respected by law and enforced according to his wishes laid down in a proper document.

### *Status of Unborn Person*

Though the dead possess no legal personality, the case is otherwise with the unborn persons. There is nothing in law to prevent a man from owning property before he is born. His ownership is contingent as he may never be born at all, but it is a real and present ownership. A man may settle property upon his wife and the children to be born of her. Even if he dies intestate, his unborn child will inherit his estate. However, many restrictions have been imposed in this connection. No testator can direct his fortune to be accumulated for a hundred years and then distribute among his descendants.

A child in the womb of his mother is for many purposes regarded by a legal fiction as already born. In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth." To what extent an unborn person can possess personal and proprietary rights is a somewhat unsettled question. It has been held that a posthumous child is entitled to compensation under Lord Campbell's Act for the death of his father. Wilful or negligent injury inflicted on a child in the womb, by reason of which it dies after having been born alive, amounts to murder or manslaughter. A pregnant woman condemned to death is respited as of right until she has been delivered of her child.

The rights of an unborn person, whether proprietary or personal, are all contingent on his birth as a living human being. The legal personality attributed to him by way of anticipation falls away *ab initio* if he never takes his place among the living. Abortion and child destruction are crimes but such acts do not amount to murder or manslaughter unless the child is born alive.

before he dies. A posthumous child may inherit, but if he dies in the womb or is still-born, his inheritance fails to take effect and no one can claim through him. The case will be otherwise if he lived for an hour after his birth. If some of the beneficiaries of a trust are unborn persons, the trust cannot be varied without obtaining the consent of the court on their behalf.

### *Legal status of Idol*

Idol is a juristic person and as such can hold property, but it is treated as a minor and the *pujari* or somebody else acts on its behalf as the guardian.

In *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, it was held by the Privy Council that an idol is a juristic person. The will of the idol as to its location must be respected. The suit was remitted in order that the idol might appear by a disinterested next friend to be appointed by the court. (1925 LR 52 Indian Appeals 745).

In *Yogendra Nath Naskar v. Commissioner of Income Tax*, the Supreme Court of India held that the Hindu idol is a juristic entity capable of holding property and of being taxed through its *shebait*s who are entrusted with the possession and management of its property. A Hindu deity falls within the meaning of the word individual under the Income Tax Act, 1922 and can be treated as a unit of assessment capable of being taxed through its *shebait*s. Neither God nor any supernatural being can be a person in law, but so far as the deity stands as the representative and symbol of the particular purpose which is indicated by the donor, it can figure as a legal person and in that capacity alone the dedicated property vests in it. There is no principle why a deity should not be taxed if it is allowed in law to own property. [(1969) 3 SCR 742]

### *Legal status of Mosque*

A mosque is not a juristic person. In *Maula Buksh v. Hafiz-ud-din*, it was held by the Lahore High Court that a mosque was a juristic person and could sue and be sued. [AIR 1926 Lah 372]. In the *Masjid Shahid Ganj* case, it was decided by the Privy

Council that suits cannot be brought by or against mosques as they are not artificial persons in the eye of law. However, the Privy Council left the question open whether a mosque could for any purpose be regarded as a juristic person [(1940) 67 Indian Appeals 251].

### Kinds of Persons

Two kinds of persons are recognised by law and those are *natural persons* and *legal persons*. Legal persons are also known as artificial, juristic or fictitious persons

(1) According to Holland, a *natural person* is "such a human being as is regarded by the law as capable of rights and duties—in the language of Roman law, as having a status" According to another writer, natural persons are "living human beings recognised as persons by the State". The first requisite of a normal human being is that he must be recognised as possessing a sufficient status to enable him to possess rights and duties. A slave in Roman law did not possess a personality sufficient to sustain legal rights and duties. In spite of that, he existed in law because he could make contracts which under certain circumstances were binding on his master. Certain natural rights possessed by him could have legal consequences if he was manumitted. Likewise, in Roman law, an exile or a captive imprisoned by the enemy forfeited his rights. However, if he was pardoned or freed, his personality returned to him. In the case of English law, if a person became an outlaw, he lost his personality and thereby became incapable of having rights and duties. The second requisite of a normal human being is that he must be born alive. Moreover, he must possess essentially human characteristics

(2) *Legal persons* are real or imaginary beings to whom personality is attributed by law by way of fiction where it does not exist in fact. Juristic persons are also defined as those things, mass of property, group of human beings or an institution upon whom the law has conferred a legal status and who are in the eye of law capable of having rights and duties as natural persons.

Law attributes by legal fiction a personality of some real thing. A fictitious thing is that which does not exist in fact but which is deemed to exist in the eye of law. There are two essentials of a legal person and those are the *corpus* and the *animus*. The *corpus* is the body into which the law infuses the *animus*, will or intention of a fictitious personality. The *animus* is the personality or the will of the person. There is a double fiction in a juristic person. By one fiction, the juristic person is created or made an entity. By the second fiction, it is clothed with the will of a living being. Juristic persons come into existence when there is in existence a thing, a mass of property, an institution or a group of persons and the law attributes to them the character of a person. This may be done as a result of an act of the sovereign or by a general rule prescribed by the government

A legal person has a real existence but its personality is fictitious. Personification is essential for all legal personality but personification does not create personality. Personification is a mere metaphor. It is used merely because it simplifies thought and expression. A firm, a jury, a bench of judges or a public meeting is not recognised as having a legal personality. The *animus* is lacking in their case

### *Kinds of Legal Persons*

There are three kinds of legal persons, *viz.*, *corporations*, *institutions* and *fund or estate*.

(1) A *corporation* is an artificial or fictitious person constituted by the personification of a group or a series of individuals. The individuals forming the *corpus* of the corporation are called its members. A corporation is either a corporation aggregate or a corporation sole.

Three conditions are necessary for the existence of a corporation. There must be a group or body of human beings associated for certain purposes. There must be organs through which the body or the group acts. A will is attributed to a corporation by a legal fiction. The corporation is distinguished from the individuals who constitute the corporation. A corporation has a personality of its own which is different from the personalities of the individuals. A corporation can sue and be sued.



Even if the members of a corporation die, the corporation continues. A corporation is recognised by law as a permanent and continuous legal entity. It is not affected by the deaths of its members. A corporation can enter into contracts with its members as it has a personality distinct from that of the members. A corporation can have property and rights and duties. Unlike natural persons, a corporation can act only through its agents. It does not die in the way natural persons die. Law provides special procedure for the winding up of a corporation.

(2) In some cases, the *corpus* or the object personified is not a group or succession of individuals but an *institution* itself. Examples of institutions are a college, church, library, mosque, hospital, an idol, etc.

(3) In some cases, the *corpus* or the object personified is some *fund* or *estate* reserved for a particular purpose. Examples of this kind of legal persons are the property of a dead man, the estate of an insolvent, a fund for charity, an estate under a trust, etc. According to Roman law, the estate of a dead person was regarded as having a legal personality by the notion of *hereditas jecens* till it was vested in the legal heirs. Likewise, the *Stiftung*, an unincorporated fund for charitable purposes, was vested with rights and duties and was itself personified.

*Corporation Aggregate*:—Corporations are of two kinds, corporation aggregate and corporation sole. According to *Halsbury's Laws of England*: "A corporation aggregate is a collection of individuals united into one body, under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual, liberty of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common, and of expressing a variety of political rights, more or less extensive, according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence." A corporation aggregate is an incorporated group or body of coexisting persons united for the purpose of advancing certain ends or interests. The number

of corporations aggregate is very large and they are of various kinds. Their importance is also very great in the field of law. Thus, we have a very large number of limited companies having millions of shareholders spread in different parts of the world. It is to be observed that a limited company is something different from its shareholders. It has a personality of its own which is different from its shareholders. The property of the company is not the property of the shareholders. The assets and liabilities of the company are different from those of its members. A company can contract with its shareholders. It is liable for torts. Even if the number of shareholders is reduced to one, the shareholder and the company are two distinct persons.

*Corporation Sole* :—Corporation sole is an incorporated series of successive persons. It is a corporation which has one member at a time. It is a body politic having a perpetual succession. It is constituted in a single person who, in right of some office or function, has the capacity to take, purchase, hold and demise land and hereditaments. A corporation sole is perpetual but there may be and mostly are periods in the duration of corporation sole, occurring irregularly, in which there is vacancy or no one in existence in whom the corporation resides and is visibly represented. Examples of corporations sole are the offices of the Postmaster-General, the Minister of Health, the Minister of Agriculture, the Public Trustees, Secretary of State for War, the Solicitor to the Treasury, the Comptroller and Auditor-General of India, the President of India, etc. A corporation sole does not require a seal but a corporation aggregate can act or express its will only by a deed under the common seal. The existence of a common seal is the evidence of incorporation and the non-existence of a common will is an evidence against incorporation. A corporation can change its seal at will.

According to Dias and Hughes, the main purpose of the corporation sole is to ensure continuity. It avoids an abeyance *in siesin*. Moreover, the occupant of the office can acquire property for the benefit of his successors. He may contract to bind or benefit them. He can sue for injuries to the property while it is in the hands of his predecessor.

A corporation sole is an example of *dual personality*. If a single human being has in one capacity legal relations with himself in another capacity, there arises a case of dual personality. The King of England exercises the function of the Crown and in his capacity as the constitutional head, he can confer rights and duties on himself as an individual. The natural person may owe a duty to the legal person. He may have rights against the legal person. The same is the case with the President of India. The trustee as an individual may owe money to or enter into contracts with himself in his capacity as a trustee.

According to Dias and Hughes: "A question that is also asked is whether a corporation can survive the last of its members. Professor Gover mentions a case in which all the members of a company were killed by a bomb while at a general meeting, but the company was deemed to survive." (p. 290, *Jurisprudence*).

*Essential Features of a Corporation.*—Reference may be made to the essential features of a corporation. A corporation has in law a different existence and personality from that of its members or shareholders. Its personality is fictitious. The incorporation of a firm brings about a fundamental change in its legal position. It comes to be invested with a personality of its own.

The distinction between a corporation and its members is fundamental. The property of a corporation is not considered to be the property of the shareholders. No shareholder can claim that a particular part of the property of a corporation belongs to him. Likewise, a corporation cannot lay any claim to the property of its shareholders. The shareholders of a corporation may be perfectly solvent but the corporation may become insolvent. As a corporation has a separate personality and existence of its own, there is no difficulty in a member entering into a contract with the corporation.

A corporation can survive the last of its members. It does not die with the death of its shareholders. The law of a country lays down the conditions according to which a corporation can be brought into existence and also ended. The successor of a shareholder does not become a shareholder. He has to get himself

registered as such. If he does not do so, he does not automatically become a shareholder. It is possible that one shareholder may purchase all the shares of the rest of the shareholders. In this way, he can become the sole shareholder. In case he dies and his successor or successors do not register themselves as shareholders, the company continues to exist even without a shareholder.

*Corporation and Firm.*—It is interesting to point out the difference between a corporation and a firm. A corporation has an existence and a personality of its own which is different from that of its members or shareholders. That is not the case with a firm. A firm is not considered to be a legal person. As a corporation has a separate personality of its own different from that of its members, it is possible for a corporation to enter into a contract with its members. However, that is not the case with a firm. No firm can enter into a contract with its members. A corporation can possess property and have rights and duties different from that of its members. Such a thing is not possible in the case of a firm. The property of the firm is the property of the members. A corporation can exist even with one member. It can even survive a sole member. This is not possible in the case of a partnership firm. There must be more than one member of a partnership firm. Moreover, a partnership firm comes to an end with the death of the partners. A corporation has a permanent existence.

*Corporation and Natural Persons.*—There is also a fundamental distinction between a corporation and natural persons. A natural person is born as a result of the working of law of nature and also dies in the same way. However, when a corporation has to be created, an application has to be made to some office set up for that purpose by law. In the case of a joint stock company, the application is made to the Registrar of Joint Stock Companies. A corporation can also be created by means of a Royal Charter or an Act of Parliament. This was done in the case of the English East India Company. In the same way, municipal corporations can be set up. A corporation also comes into existence by prescription. The same is the case with regard to the

dissolution of corporations. A corporation can be declared defunct when it stops doing its business. Its charter can be forfeited. It can voluntarily surrender its charter or the privileges granted to it.

A natural person can act himself. It is not binding on a natural person to get his work done through others. However, in the case of a corporation, it is absolutely essential that it must act through its agents. Moreover, a natural person can do whatever he pleases. There is no restriction on what he can do and what he cannot do. However in the case of a corporation, its powers are defined in the instrument when the corporation is created. A limited company cannot go beyond the terms of its memorandum of association. Even if all the shareholders of a company agree, they cannot do a thing which is beyond the terms of the memorandum of association. However, the memorandum of association itself can be changed.

### *Theories of Corporate Personality*

There are many theories with regard to the nature of corporate personality and those are the fiction theory, the realistic theory, the concession theory and the bracket theory.

(1) *Fiction theory* —The fiction theory was pronounced by Savigny. According to him, a personality is attached to corporations, institutions, and funds by a pure legal fiction. The personality of a corporation is different from that of its members. There is a double fiction in the case of a corporation. By one fiction, the corporation is given a legal entity. By the second fiction, the corporation is clothed with the will of an individual person. The fictitious personality of the corporation comes to have a will of its own which is different from that of its members.

Savigny writes: "The essential quality of all corporations consists in this, that the subject of the right does not exist in the individual members thereof (not even in all the members taken collectively) but in the ideal whole: a particular, but specially important result whereof is, that by the change of an individual member, indeed, even of all the members, the essence and unity of a corporation is not affected." Sir John Salmond is of the

view that a corporation is so far distinct from its members that it is capable of surviving even the last of them. A company incorporated by an Act of Parliament can be dissolved only as provided therein or by another Act of Parliament. The fact that all the members of the company have ceased to exist does not affect the existence of the company. What survives all its members is only a fictitious creature of law.

Sir Frederick Pollock maintains that the common law of England does not recognize the fiction theory of corporate personality. In English law neither collective liabilities nor collective powers can be incurred or claimed by a body of individuals unless it can satisfy the requirements of incorporation. Unincorporated bodies are not treated as legal persons in English law. Before a body of persons can have rights and duties in their corporate character, they have to be incorporated according to law. An ordinary social club has no recognition as a legal person in its collective capacity. The club can neither sue nor be sued in its own name unless it has formally submitted to an act of incorporation according to law. Corporate personality is a mere creature of law and depends entirely upon the fiat of the State. Dr. Jenks writes: "There would, it may be suggested, be little practical difficulty in the working out of the more liberal view of the collective person than that adopted hitherto by English law."

(2) *Realistic theory*.—This theory was propounded by Gierke, the great German jurist. He has been followed by Maitland, Beseler, Lasson, Bluntschli, Zitelmann, Miraglia, Sir Frederick Pollock, Geldart, Pollock, Jethrow Brown, etc. According to Gierke, every group has a real mind, a real will and a real power of action. A corporation has a real existence independent of the fact whether it is recognised by the State or not. The corporate will of the corporation expresses itself through the acts of its servants and agents. The existence of a group person goes beyond the aggregate of the individualities of persons forming the group. There is no legal fiction about the personality of a group person. It is independent of its recognition by the State. According to this theory, every group comes to have a personality of its own whether that group is a social one or a political one.

It is pointed out that a group or an association of persons has a will of its own which is different from the individual wills of the members. The wills of the members react on one another to produce a new and distinct will and that will is possessed by the group person.

Psychological research has shown that the association of many persons produces a will which is different from the wills of its members. The group or corporate will inspires the action taken by the group just as an individual will of a man inspires his action. In the words of Dicey: "When a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a bond which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted." In individual consciousness an individual will invests an individual with personality, group consciousness and group will invest the group with a personality as real as the corresponding personality of the individual. To quote Miraglia: "The corporation is in a certain aspect more real than the individual because it possesses greater complexity of parts and represents a higher form of evolution." When it is said that corporate personality is a reality, it is not suggested that a corporation is an actual person. All that is meant is that a corporation is a representation of psychical realities that exist independently of the fiat of the State and are recognized rather than created by it. The concept of group personality belongs to the world of the psychical realities and not of material realities. Prof. Gray denies the reality of collective will. To quote him: "A collective will is a figment. To get rid of the fiction of an attributed will by saying that corporation has a real general will is to drive out one fiction by another." The view of Sir John Salmond is that even if the group will is a reality, it is not possible to concede that "the reality of the unitary notional entity which may in law survive the last of its members." He maintains that the realist theory is inapplicable to a corporation sole. The attribution of personality to the succession of the holders of certain offices where there can be no pretence to psychological unity, is regarded by him as destructive of the realist theory of corporate personality. Gray writes: "A corporation

sole is not a fictitious or juristic person; it is simply a series of natural persons some of whose rights are different and devolve in a different way from those of natural persons in general." There is a tendency in English law to accord recognition to collective persons as real persons. In the case of *Willmott v. London Road Car Co.*, a lessee covenanted not to assign or underlet without the consent of the lessor which was not to be withheld in respect of "a respectable and responsible person". It was held that the word "person" in the covenant included a corporation.

It is contended that the difference between the fiction theory and the realist theory is merely verbal. To quote Prof. J. C. Gray: "Whether the corporation is a fictitious entity or whether, according to Gierke's theory, it is a real entity with a real will, seems to be a matter of no practical importance or interest. On each theory the duties imposed by the State are the same and the persons on whose actual wills those duties are enforced are the same." (*The Nature and Sources of the Law*, p. 55). Glanville Williams is also of the view that the controversy has no real significance. However, it is maintained that the two theories are capable of leading to radically different legal conclusions. To quote Prof. Geldart: "Take the case of a society, neither incorporated nor bound by a charitable trust, but formed and existing for a common object. The purpose ceases or the members refuse to carry it out. Can they dissolve and divide the society's property among themselves? Yes, if we can see nothing but co-ownership and contract. No, if we can see here a body which is more than the sum of its members, with a life which should be preserved, if possible, from self-destruction, with property which in the worst case will be *bona vacantia* and as such available for the public benefit." It is not proper to belittle the importance of the two rival theories regarding corporate personality.

(3) *Concession theory*: According to this theory, the only realities are the sovereign and the individual. The other groups cannot claim recognition as persons. They are treated as persons merely by a concession on the part of the sovereign. Legal personality is conferred only by law.



(4) *Bracket theory*: According to this theory, the members of a corporation are the bearers of the rights and duties which are given to the corporation for the sake of convenience. It is not always practicable or convenient to refer to all the innumerable members of a corporation. A bracket is placed around them to which a name is given. That bracket is the corporation. The weakness of this theory lies in the fact that it is not able to indicate when the bracket may be removed and the mask lifted for the purpose of taking note of the members constituting the corporation. The bracket theory is associated with the name of Ihering, a German jurist. Hohfeld, an American jurist, has also advocated a variant of this theory. His view is that a corporate personality is the creation of arbitrary legal rules designed to facilitate proceedings by and against a corporation in a court. The jural relations actually decided by the courts are those which relate to the members of the corporation and they alone are real persons.

(5) *Purpose theory*: Brinz, the German jurist, has propounded the purpose theory of corporate personality. In Germany, foundations or *Stiftung* are treated as juristic persons. A foundation is no more than a trust for a specific charitable purpose. Such trusts or foundations are not treated as persons in English law. About the foundation or *Stiftung* in German law, Brinz observes that the juristic person in such a case is merely the property set apart for the foundation personified for facilitating legal transactions.

Salmond criticizes the theory of group-person on two grounds. It is not applicable to a corporation sole as we cannot have any group mind or group personality. Moreover, a corporation aggregate can exist even if there is only one surviving member or there is no member at all. Under the circumstances, it is not possible to talk of a group. Collective will is considered to be a fiction and it is pointed out that to replace the fiction theory by realistic theory is to drive out one fiction by another fiction.

According to Keeton, if corporations exist independently of State recognition, there must be a number of corporate persona-

lities which have not yet received State recognition. The State may concede legal personality to associations or groups, which have no true corporate existence but which are united simply to achieve together limited ends.

According to Gray: "Whether the corporation is a fictitious entity or whether, according to Gierke's theory, it has a real entity with a real will, seems to be a matter of no practical importance or interest. On each theory the duties imposed by the State are the same and the persons on whose actual wills those duties are enforced are the same."

According to Kelsen, legal personality is itself nothing but a fiction. Legal order can attribute legal personality at will. If it wishes to do so, it can personify things, institutions or groups. "Juristic and physical persons are essentially on the same plane. The physical person is the personification of the sum-total of legal rules applicable to one person. The juristic person is the personification of the sum-total of legal rules applicable to a plurality of persons."

According to Prof. Friedmann: "In its pure form the fiction theory is politically neutral. Its offspring, the concession theory, is, however, an eminently political theory; its principal purpose has been to strengthen the power of the State to deal as it pleases with group associations inside the State. The State alone, though itself a juristic personality, is placed on the same level as the individual. Its personality is really beyond question, and it bestows on or withdraws legal personality from other groups and associations within its jurisdiction as an attribute of its sovereignty. It is not surprising that the theory was found handy, for example, to justify the confiscation of Church property in the French Revolution and that it underlies the claim of any political dictatorship to prohibit freedom of association. The concession theory is, in fact, the necessary concomitant of any theory of unfettered State sovereignty." (p. 513, *Legal Theory*).

According to the same writer: "While each of these theories contains elements of truth, none can, by itself, adequately inter-

pret the phenomenon of juristic personality. The reason is that corporate personality is a technical legal device, applied for a multitude of very diverse aggregations, institutions and transactions which have no common political or social denominator, whereas each of the many theories has been conceived for a particular type of juristic personality. None of them foresaw the extent to which the device of incorporation would be used in modern business."

Dias and Hughes have made certain observations about the theories of corporate personality. Their view is that no single theory takes into account all the aspects of the problem of personality. We should at all times keep clear in our minds two questions. The first question is, what does any given theory set out to explain? The second question is, what do we ourselves want a theory to explain? The theories that have been considered are philosophical, political or analytical. We must remember that the law has been dealt upon empirically, and on a functional basis. English law has not committed itself to any theory. There is undoubtedly a good deal of theoretical speculation, but it is not easy to say how much of it affects even single decisions. Authority can be found in the same case to support different theories.

Two linguistic fallacies appear to lie at the root of too much of theorising. The first is that similarity of language form has masked dissimilarities in the ideas behind it. We speak of corporations in the same language that we use for human beings. However, the ideas which the language expresses differ in the two cases. The other fallacy is the persistent belief that words stand for things, whereas they only represent ideas. That has led to a lot of confusion. A glance at the development of the word '*persona*' shows progressive shifts in the ideas represented by it. It meant originally a mask, then the character indicated by a mask, the character in a play, someone who represents the character, a representative in general, a representative of the church, a parson. It is not easy to trace precisely how the word '*persona*' acquired its technical meaning of an entity with rights, etc. It is true that the law can only take account of the human beings in this way which

in Roman law meant to bear, to sue as well as own property. The development of these capacities in bodies such as the municipium, collegium, etc., may have helped to abstract the idea. However, it would be wrong to suppose that the word *persona* was used technically in this sense. There was only a tendency in that direction in late law. Some such idea of *persona* seems to have been present in the mind of Tertullian who brought his legal ideas to bear on the interpretation of the "person" of Christ. He gave the word another shift in meaning as the possessing of the "properties" of divinity and humanity. In English law, the extension of the term from human beings to corporations and the like represents another shift.

*Nationality of Corporation:* As a corporation has no physical existence, the question of its nationality and domicile is a difficult one. Broadly speaking, a corporation incorporated in accordance with the requirements of Indian law is an Indian corporation and a corporation incorporated according to foreign law is a foreign corporation. The latter is recognized as a legal person by Indian law and as such can sue and be sued in Indian courts. In normal times, the question of nationality may be taken to be conclusively settled by the place of incorporation but difficult problems arise in times of war. The courts are called upon to decide as to whether a particular corporation is an enemy corporation or a friendly one. On this decision depends the fate of the assets of a corporation.

The general principle with regard to the domicile of the corporation is that it is domiciled where its office or head office is registered provided it carries on its business there. In the case of *Daimler* (1916), it was held that even if a corporation is registered in England and carries on business in England, it has an enemy domicile if all its shareholders are enemy aliens. It is possible for a corporation to have more than one domicile. In the case of *Swedish Central Co. v. Thompson*, it was held that a corporation may have one domicile where its registered office is situated and another domicile where the controlling influence in the corporation is situated.

*Liabilities of a Corporation:-* A corporation is not a natural

person and has to act through its agents. The law provides that a corporation owes both civil and criminal liability for the acts done by its agents within the scope of their employment.

As regards *civil liability*, a corporation is liable for the tortious acts of its servants or agents if the act was done within the scope and course of employment and the act was within the powers of corporation. This is so if the act would be a tort if done by a natural person. This is the rule of *vicarious liability*. The old view was that as a corporation had no mind of its own, it could not be held responsible for torts. However, that view has been given up in modern times.

In the sphere of contracts, it has been held that generally a corporation contracts under a seal and the presence of the seal is an evidence of the assent of the corporation. However, there are certain exceptions to the general rule. It has also been held that the relation of the corporation to its agents falls within the ordinary law of master and servant and consequently an agent is bound to act within the scope of his authority if he wishes the act to bind the corporation. The capacity of a corporation to act may be limited by the terms of its charter or by the statute errating it. In these cases, any attempt to perform an act beyond those powers would be *ultra vires* so far as the corporation is concerned and consequently would have no legal effect.

In the case of *Abrath v. North Eastern Railway Company*, [(1886) 11 AC 247] the railway company prosecuted Dr. Abrath, a surgeon, on the ground that he had given a false certificate to a passenger who was alleged to have received injuries in a railway accident. However, the surgeon was acquitted. After that the surgeon filed a suit against the railway company for damages for the tort of malicious prosecution. It had to be proved by the plaintiff in that case that the malicious prosecution was made with an improper motive. However, it was held by Dr. Bramwell that "a corporation is incapable of malice or motive". The personality of a corporation is only a fiction and it is not possible to attribute any mind to it, whether guilty or otherwise. Only those acts can be attributed to the corporation which are within the scope of the charter of incorporation of the corporation. Illegal acts

are *ultra vires* and cannot be attributed to the corporation. Neither criminal liability nor tortious liability can be attributed to a corporation.

However, in the case of *Citizens Life Assurance Company v. Brown*, (1904 AC 423) a superintendent of the company sent a circular letter to its policy-holders containing certain allegations against an ex-employee of the company. The ex-employee brought a suit against the company for damages. The question that arose for determination was whether a corporation was liable or not. It was held by Lord Lindley that the corporation was liable for the tort of defamation on the ground that it was liable for the torts of its servants committed in the course of their employment.

As regards the *criminal liability* of a corporation, it cannot have a guilty intention necessary for a crime as a corporation has no mind of its own. To begin with, corporations were exempted from criminal liability, but that is not the case today. They can now be punished for the offences of non-feasance and even misfeasance. This is so when a statutory duty is not performed by a corporation or the same is performed badly. In these cases, punishment is usually by way of fine.

According to Keeton: "In crime, the concurrence of three elements is necessary before liability can be properly attributed to the corporation:

- (1) The crime must be one in which it is not necessary to prove a guilty state of mind in the person charged.
- (2) The offence must be of a kind that the act or omission of the agent may also be said to be the act or omission of the corporation.
- (3) The punishment must be a fine, at least as an alternative, or some other punishment which may be inflicted on the corporation.

Critics point out that it is not desirable to punish corporations. If we punish a corporation, it really amounts to punishing the beneficiaries. It is not proper that the agents should do the wrongful acts and the beneficiaries should suffer. This is against

natural justice. Moreover, a corporation cannot do or authorise any wrong and consequently should not be made liable for the wrongful acts of its agents outside the limits of their authority. However, it is maintained that the agents of a corporation are in reality the agents of the beneficiaries and consequently there is nothing wrong if the beneficiaries are made to suffer for the acts of omission and commission of their agents. The liability of a corporation is as much logical as the liability of any other ordinary employer. A corporation is held responsible on the ground that it should not have selected careless and dishonest agents.

*State as a Corporation.*—The State is a legal person in international law. Recognition is one of the methods by which an international personality is conferred on a State. Recognition is a matter of fact and formal recognition is merely a matter of course. The United Nations also has a legal personality.

In the U.S.A. the State is recognised as a person. The federation is a person in law and the same is the case with the States. Legal proceedings are started in the name of “the State of New York” or “the people”. In the case of India, the Union of India is recognised as a legal person. Suits can be filed against the Union of India and also by the Union of India. Likewise, the suits can be filed against the State Government in India and also by the State Governments against others.

For a long time, the Law of England did not recognise the State as a corporation or a legal person. That was partly due to the monarchical form of government in the country. The King is a corporation sole and he holds all the powers and prerogatives of the government. The public property in the eye of law belongs to the King. The actions of the government are the actions of the King.

According to Holland, the State is a greater juristic person and enjoys many *quasi*-rights against individuals as is liable to many *quasi*-duties in their favour. The State is usually a great landed proprietor. As such, it is entitled to servitudes over the estate of individuals and subject to servitudes for the benefit of such estates.

According to Jethrow Brown: "The personality of the State has not been recognized either by the poverty of our ideas or by the conservatism of our temperament and we are driven to the device of attributing privileges and responsibilities to the King which are not really his " Again, "the legal recognition of the State as a collective real person is simply a matter of time."

It is to be observed that by the passing of the Crown Proceedings Act, 1947, the responsibility of the State has been recognized in England also. This is particularly so in the case of torts. It is true that the State has not been put on the same footing as other natural legal persons but a good beginning has already been made.

*Uses and Purposes of Incorporation.*—There are many advantages of a corporation.

(1) Collective ownership and collective actions are cumbersome in law. Law always prefers to convert a collective ownership into an individual ownership. This it does in two ways, viz., by trusteeship and by incorporation. A trust can be created in the interests of the beneficiaries. The trustees are given the power to act, sue or be sued on behalf of the beneficiaries. In the case of incorporation, a fictitious person is brought into existence and given the power and authority to act on behalf of its members. In this way, it is not necessary to make all the shareholders parties in the case. Incorporation secures permanence, uniformity and unity.

(2) When a large number of individuals have a common interest vested in them and have to act commonly in the management and protection of that interest, incorporation serves a useful purpose. It is impossible for the large multitude of individuals, scattered over vast distances, to act in a concerted manner in the management of their common interest. In such circumstances, incorporation enables the fictitious personality of the corporation to act promptly and decisively in the best interests of the management and protection of the common interest. A modern commercial venture with the capital of a large number of people is impossible without the device of incorporation.



(3) Independent corporate existence is one of the most important advantages of incorporation. Unlike a partnership which has no existence apart from its partners, a corporation is a distinct legal person in the eye of law. By incorporation, a company is vested with a distinct corporate personality which is distinct from the members who compose it.

(4) If a series of persons, not all existing at the same time, but having successive existence one after the other, have a common interest and if their need be the continuity of management and protection of interest, incorporation is a useful device. Perpetual succession is another advantage of incorporation. Members may come and members may go but the corporation goes on for ever.

(5) Another advantage is that a company, being a legal person, is capable of owning, enjoying and disposing of property in its own name. The shareholders are not the private and joint owners of the property of the company. Incorporation helps the property of the company to be clearly distinguished from the property of the shareholders, while in a partnership, the distinction between the joint property of the partnership firm and the private property of its partners is often not clear and distinct.

(6) A freely transferable nature of the shares of a company is another advantage of incorporation. A shareholder can sell his shares in the market and get back his investment without going to the company to withdraw his money.

The special purpose of incorporation is that it helps commerce. No individual is prepared to invest millions in a risky enterprise. He is always afraid of becoming a pauper. However, dangerous enterprises can be undertaken only by a corporations. This is due to the limited liability of its members. Thousands of shares of a nominal value can be sold and the required money can be collected. If I have bought a share of Rs. 10 only, my liability is to the extent of Rs. 10 and nothing more. If the worse comes to the worst, I lose Rs. 10 and nothing more. My liability is merely a limited one. If the liability were an unlimited one, the whole of my assets could be snatched away to pay for the losses. It is obvious that even if millions are lost by a corpo-

ration, the shareholders suffer only to the extent of their shares. It goes without saying that one of the factors which has helped the growth of industry in modern times is the development of corporations.

According to Keeton: "The advantages of incorporation have been the primary reasons for the creation of corporate bodies. In the first place, incorporation greatly simplifies legal procedure, enabling a person to proceed against one individual, instead of against a great number of persons. Conversely, the corporation proceeds as a single person. In addition, the death or withdrawal of a member occasions no inconvenience to the remaining members of the group through the necessity to withdraw also some portion of the common property, or even to terminate the association altogether—as would be the position if no corporation existed. Thus, in a partnership, death of one member automatically terminates it, and on the withdrawal of a member, he takes his share of the property and profits with him. In a corporation, on the other hand, a member has a share in the corporation, and not a right to any particular portion of the corporation's assets, and the existence of the corporation itself is unaffected by his death or withdrawal, his share being transferred to some other person, who replaces him as a member. Thus, 'a corporation never dies'. It exists indefinitely unless brought to an end in one of certain specified ways. Lastly, a beneficial development of modern law has resulted in the limitation of the financial liability of a member of the corporation. Although limited partnerships are now possible in most modern systems of law, a member of a partnership is more frequently liable to the full extent to his property, not only for his own actions, but for those of his partners as well, if committed in the furtherance of the partnership's activities. In a corporation, a member is only liable to the value of the interest he holds."

### *Judicial Decisions*

In *Saloman v. Saloman and Co.*, a trader sold a solvent business to a limited company which consisted of the vendor, his wife and children only. In payment of the purchase money, the company issued debentures to the vendor. Later on, the company went

into liquidation. The question for decision was whether this debenture holder was entitled to be paid in preference to the unsecured creditors. The question was answered in the affirmative. It is clear from this case that a man may become his own preferred creditor by taking debentures from a company of which he holds practically all the shares. This is due to the fact that the company has a legal personality different from that of the shareholders. This case also shows that one can seek shelter behind this legal person without one's real connection with the corporation being unmasked. (1897 AC 22).

In *Daimler Company Ltd. v. Continental Tyre and Rubber Co. Ltd.*, the respondent company was incorporated in England for the purpose of selling in England tyres made in Germany by a German company. Most of the shareholders of that company were Germans. After the outbreak of war in 1914 between England and Germany, an action was started in the name of the respondent company for the recovery of a trade debt. The action was resisted on the ground that the plaintiff was an "alien enemy" at war with England and hence the suit was not maintainable. The contention of the plaintiff was that the nationality of the company was distinct from that of its shareholders and as it was registered in England, the declaration of war had no effect on it. The decision was given against the company by the House of Lords. Lord Parker observed: "What is involved in the decision of the Court of Appeal is that for all purposes to which the character and not merely the rights and powers of an artificial person are material, the responsibilities of natural persons who are its corporators, are to be ignored. An impassible line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it." The House of Lords held that the enemy character of individual shareholders and their conduct could be material on the question whether the company's agents and persons in *de facto* control of the company were adhering to the enemy. If the persons in control of the company were resident in an enemy country or were adhering to the enemy, that company would assume an enemy character. The House of Lords *pierced the veil* sought to be drawn over the

physiognomy of the company for the purpose of ascertaining who were the corporators behind the company.

In *Wurzel v. Houghton Main Home Delivery Service Ltd.* and in *Wurzel v. Atkinson*, the difference between an incorporated and an unincorporated association with regard to legal consequences was brought out. Under the Road and Rail Traffic Act, 1933, the holder of a private carrier's licence known as "C" licence, was forbidden from using the vehicle for the carriage of goods for hire or reward. A group of miners incorporated a company to get cheap delivery of coal from the colliery. A motor goods vehicle in respect of which the company held "C" licence was used for making delivery of coal at the houses of its members and charges for delivery were deducted from the wages of the members. It was held that as the society was an incorporated one, it was a legal entity distinct from its members and there was breach of conditions under which "C" licence was held as the vehicle was used for carriage of goods for hire or reward. Another group of miners formed an association without incorporating it. They made use of the vehicle of the association for delivery of coal at the house of its members. It was held that each member was a part-owner of the vehicle and as co-owners could not be said to be carrying their own goods for hire or reward by contributing to the running expenses, there was no breach of the conditions of "C" licence.

Ordinarily, only an incorporated body can sue or be sued and an unincorporated body cannot sue or be sued in its own name. This rule was very useful for trade union organizations which were usually not incorporated associations. In the case of *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, the House of Lords decided in 1901 that a trade union could be sued for damages arising out of the wrongful acts of its officials. The union concerned had to pay £ 2300 in damages and legal expenses in addition. The trade unions carried on an agitation against the decision and ultimately the Trade Disputes Act of 1906 gave complete protection against judgments like the *Taff Vale Railway Company*.

## SUGGESTED READINGS

- Carr, C. T. : *The General Principles of the Law of Corporations*, Cambridge University Press, 1905.
- Drucker : *Concept of the Corporation*.
- Farnsworth, A. : *The Residence and Domicile of Corporation*.
- Ford, H. A. J. : *Unincorporated Non-Profit Associations*, Clarendon Press, Oxford, 1959.
- Gower, L. C. B. : *The Principles of Modern Company Law*, Stevens and Sons, 1969.
- Gray, J. C. : *The Nature and Sources of the Law*, Macmillan Company, New York, 1921.
- Hallis, F. : *Corporate Personality*, Oxford University Press, 1930.
- Holland, T. E. : *The Elements of Jurisprudence*, Oxford, 1924.
- Jenks, E. : *The New Jurisprudence*, John Murray, 1933.
- Keeton, G. W. : *The Elementary Principles of Jurisprudence*, 1949.
- Kocourek, A. : *Jural Relations*, 1928.
- Lloyd, D. : *The Law Relating to Unincorporated Associations*, Sweet and Maxwell, 1938.
- Lloyd, D. : *The Idea of Law*, Penguin Books, 1964.
- Markby, W. : *Elements of Law*, Oxford, 1905.
- Nekam, A. : *The Personality Conception of the Legal Entity*, Harvard University Press, 1938.
- Paton, G. W. : *A Text Book of Jurisprudence*, Clarendon Press, Oxford, 1972.
- Pollock, F. : *A First Book of Jurisprudence*, Macmillan and Company, 1929.
- Pound, R. : *Jurisprudence*, 1959.
- Salmond, J. W. : *Jurisprudence*, 1966.
- Wortley, B. A. : *Jurisprudence*, Manchester University Press, 1967.

## XVI

### TITLE

#### Definition and Nature of Title

The term "title" is derived from the term *Titulus* of Roman law and *Titre* of French law. According to Salmond, title is the fifth element of a legal right. To quote him: "Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner". However, Holland does not include title as an element of a legal right. A tendency is to be noticed towards the identification of title with right. According to Lord Blackburn: "The first question which arises is whether on these facts the plaintiff had any title in the ship.....No title in the ship was conveyed." Austin does not approve of the use of title for right. His contention is that title is not the right itself but merely an element of right. While title indicates the idea of an investitive fact, right is a power, faculty or capacity conferred on a person and is founded in the title. The party entitled is invested with right by the investitive fact.

Legal rights are created by title. A person has a right to a thing because he has a title to that thing. According to Justice Holmes: "Every right is a consequence attached by the law to one or more facts which the law defines and wherever the law gives anyone special right, not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true to him." It is these special facts which constitute the title. Title means any fact which creates a right or duty. According to Salmond: "*The title is the de facto antecedent of which the right is the de jure consequent* If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other and these facts are the title of the right." A person may acquire right on account of his birth or he may acquire the same by per-

sonal efforts later on but in both cases title is essential. Title is the root from which the rights proceed.

Holland does not approve of the use of the term title as it does not indicate the facts which transfer or extinguish rights. To quote him: "A fact giving rise to a right has long been described as a title, but no such well-worn equivalent can be found for a fact through which a right is transferred or for one by which a right is extinguished."

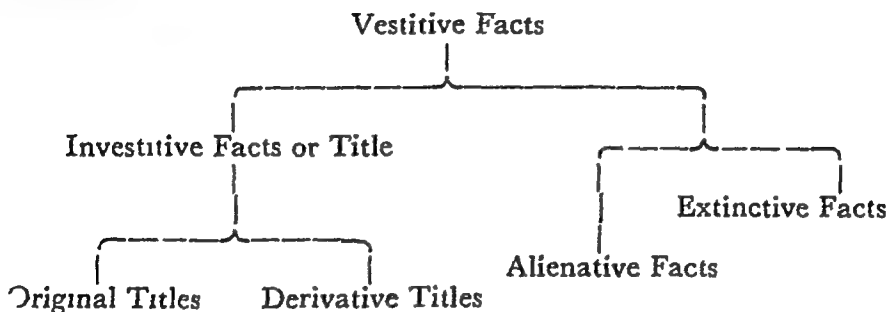
Bentham also objects to the use of the term title and suggests the term "dispositive facts". He divides the dispositive facts into three parts: investitive facts, divestitive facts and translatiive facts. He redivides the investitive facts into collative facts and impositive facts.

### Classification of Titles

Titles are also called investitive facts or facts as a result of which a right comes to be vested in its owner. Salmond divides the vestitive facts into two parts, *viz.*, investitive facts or titles and divestitive facts. *Investitive facts* or titles are further divided into original titles and derivative titles. *Divestitive facts* are divided into alienative facts and extinctive facts. Vestitive facts are those which have relation to right. They relate to the creation, extinction and transfer of rights. Investitive facts create rights and divestitive facts destroy them. A right may be created *de novo* and it may have no previous existence. Such a right is called an *original title*. Examples of original title are my catching a fish from the river, my writing a new book, my invention of a new machine, *etc.* If a right is created by the transfer of an existing right, it is called a *derivative title*. If I buy fish from a fisherman who has caught the same from a river, my title is a derivative one. If the author of a book assigns the copyright of his book to another person, the latter acquires a derivative title.

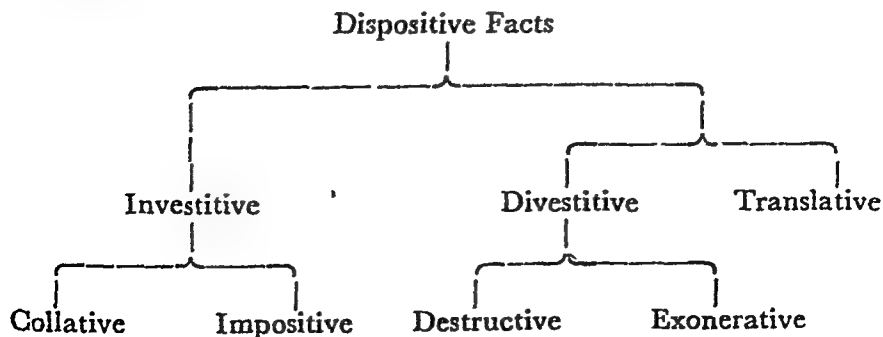
The facts of which the legal result is to destroy rights are called extinctive divestitive facts. The facts of which the legal result is to transfer rights from the owner are called alienative divestitive facts.

It is to be noted that in the case of a transfer of a right, the same facts are derivative investitive facts and alienative divestitive facts. If I sell my fish to *X*, it is derivative title so far as *X* is concerned and alienative divestitive fact so far as I am concerned. The main features of vestitive facts are that they either create a right, or extinguish it or transfer it from one person to another. The following table illustrates the classification of titles given by Salmond.



A reference has already been made to the classification of Bentham. According to him, dispositive facts can be divided into three parts, *viz.*, investitive facts, divestitive facts and translati-  
 vative facts. Translative facts refer to the transferring of rights and duties. Investitive facts are divided into two parts: collative and impositive facts. Collative facts confer rights and impositive facts impose duties. Divestitive facts are sub-divided into destructive and exonerative facts. Destructive divestitive facts end rights and exonerative divestitive facts release persons from duties.

Bentham's classification can be illustrated by the following diagram:





According to another classification, vestitive facts operate in pursuance of a human will or independently of the same. They are divided into two categories : acts of the law and acts in the law. Acts in the law are further divided into unilateral acts and bilateral acts. Unilateral acts are either subject to dissent or independent of the same. Bilateral acts or agreements are of four kinds, *viz.*, contracts, grants, assignments and releases. Contracts and grants are either creative or extinctive. Those are also valid or invalid.

### *Act in the Law*

Acts in the law are really the acts of the parties performed voluntarily. These facts create, transfer and extinguish rights. They express the will of the parties. Acts in the law are of two kinds : unilateral and bilateral acts. Unilateral acts are those in which the will of only one party is effective or operative. The transaction is perfectly valid even without the consent of the parties who are going to be affected. Examples of unilateral acts are a testamentary disposition, the exercise of a power of appointment, the avoidance of a voidable contract *etc.* The exercise by a mortgagee of his right of sale is unilateral. It is effective whether the mortgagor gives his consent or not. The same is the case with a will. The consent of the persons in whose favour the will is executed is not necessary.

Bilateral acts require the consenting will of two or more distinct persons or parties. Examples of bilateral acts or agreements are contracts, mortgages, leases, grants *etc.* It is to be observed that the same act in law may be unilateral with regard to some parties and bilateral with regard to others. If *A* entrusts property to *B* in trust for *C*, the conveyance is bilateral so far as *A* and *B* are concerned and unilateral so far as *C* is concerned. It is possible that *C* may not have any knowledge of the conveyance.

### **Importance of Agreements**

Great importance is attached to agreements between the parties. That is partly due to the fact that agreements are evidence of right and justice and the parties adjust their rights and liabilities by their own free consent. Moreover, agreements

create rights and duties. As legislation is the public declaration of the rights and duties of the subjects, likewise an agreement is a private declaration of the rights and duties of the parties concerned. Ordinarily, agreements are enforced by the courts. An agreement constitutes the best evidence of justice between the parties and should be enforced. It is proper to fulfil the expectations of the parties based on their mutual consent if the same is not opposed to the idea of natural justice.

### Kinds of Agreements

There are three kinds of agreements. Some of them create rights, some transfer them and the others extinguish them.

(1) The agreements which create rights are of two kinds: contracts and grants. Contracts create rights and obligations among the parties *in personam*. A contract creates a legal tie of a personal right and that tie binds the parties. According to Salmond, contracts are bilateral but there are some unilateral contracts as well. Contracts are unilateral when a promise is made by one party and accepted by the other. Grants are agreements by which rights other than contractual rights are created.

(2) Agreements which transfer rights are called assignments.

(3) There are agreements which extinguish rights and those are known as releases.

An agreement may be *valid* or *invalid*. A valid agreement is one which is enforced by the courts of law of the country. It is in accordance with the true intention of the parties. Invalid agreements are those which have some defect in them and that defect prevents them from being fully operative. Invalid agreements are of two kinds, *viz.*, *void* and *voidable*. Void agreements are those which are not recognised at all by law. The will of the parties does not matter in such cases. A voidable agreement is one which by reason of some defect in its origin is liable to lose its effect at the option of one or more parties. A voidable agreement is not *null* and *void* from the very beginning. However, it can be challenged by a party concerned and in that case it becomes void from the date on which it was entered

into. The effect of nullification is retrospective and not prospective. Voidable agreements occur in the case of coercion, fraud or misrepresentation. A voidable contract lies midway between a valid and a void contract.

### Validity of Agreements

(1) Salmond points out many defects which make an agreement invalid. Incapacity of the parties may render an agreement invalid. In the eye of law, certain persons are not competent to enter into contracts and consequently contracts by them are invalid. This is so in the case of minors and lunatics.

(2) There are certain agreements which require certain legal formalities to be fulfilled and if those formalities are not fulfilled, the agreement becomes invalid. The want of a written agreement, the non-registration of an agreement or the omission of the signatures of the parties, may make an agreement invalid. The formalities are imposed by law with a view to prove satisfactorily the consent of the parties to the terms and to distinguish the actual agreement from the negotiations leading to it.

(3) Some agreements are declared to be invalid by law. Such agreements are immoral or against public policy. Examples of such agreements are wagering contracts or agreements in restraint of trade.

(4) An agreement may become invalid on account of some error or mistake. A mistake may be either essential or unessential. In the case of an essential mistake, the parties do not in reality mean the same thing and do not agree to anything. If *X* agrees to sell land to *Y* and while *X* is thinking of one piece of land, *Y* thinks of another piece of land, the agreement becomes invalid on account of an essential mistake. In the case of an unessential mistake, it does not relate to the nature or contents of the agreements, but only to some external circumstances which induced one party to give his consent and which does not make the agreement invalid. It is the duty of the buyer to beware and if he has failed to do so, he cannot be allowed to take advantage of his own mistake.

(5) An agreement also becomes invalid if the consent of any of the parties is obtained by means of compulsion, undue influence or coercion. Only that agreement is valid which has been entered into with the consent of the parties.

(6) If there is a want of consideration in a particular agreement, that agreement becomes invalid. Law requires that if an agreement is to be valid, it must be for a valuable consideration. The consideration must be valuable although it may not be adequate. Even the inadequacy of consideration is taken into account to find out whether the consent of the promisor was freely given or not. According to Section 25 of the Indian Contract Act, an agreement without consideration is void. However, there are certain exceptions to the general rule.

### **Modes of Acquiring Possession**

There are two modes of acquiring possession. Possession may be acquired by taking the thing with the requisite *animus*. Such taking may be wrongful as when a thief steals a watch. Another method of acquiring possession is by delivery. Delivery is the voluntary relinquishment of possession by one person in favour of another. Delivery is actual when the union of *corpus* and *animus* in the possessor is brought about for the first time as a result of the delivery by the previous possessor. Delivery is said to be constructive when there is no physical dealing with the thing but by a mere change in *animus* possession is secured. When *X* sells and hands over a book to *Y* or lends to *Y*, there is an actual delivery of it. The delivery of the key to a warehouse is actual delivery of the goods contained in it as the key gives access to the goods. *X* sells his house to *Y* and continues in possession agreeing to vacate the house whenever required by *Y*. Here *Y* has secured mediate possession by constructive delivery. *X* sells to *Y* land which is in the possession of a tenant *Z*. The tenant attorns to *Y* and acknowledges him as his landlord. In this case, *Y* secures mediate possession by constructive delivery.

### **Modes of Acquiring Ownership**

There are many modes of acquiring ownership. On the principle of *occupatio*, a person may become the owner of a *res*

*nullus* by taking possession of it. The thing concerned did not belong to anybody. However, in modern times, things without owners are rare.

Ownership may be acquired by long possession or prescription. By positive prescription, the lapse of time confers a title on the person who had enjoyed the right for the prescriptive period. The enjoyment of a right of way over the land of another for twenty years confers a prescriptive right of way on the person who has enjoyed the right for the prescriptive period. In India, the holder of a promissory note payable on demand cannot enforce it if three years have elapsed from the day when money became payable thereunder. This is known as negative, imperfect prescription or limitation of actions. The lapse of time may not only bar the remedy but extinguish the right itself. This is called perfect negative prescription. In limitation of actions, the barred right subsists for certain purposes. A barred debt cannot be enforced in a court of law but it can serve as a consideration for a promissory note. In perfect negative prescription, the right itself is extinguished. The lapse of time may not only bar the remedy and extinguish the right of the original holder but even transfer that right to the opposing claimant who is in enjoyment of the right. A trespasser who is in possession of the land of *X* for twelve years, gets a title to the land by prescription while *X* loses his title to the property. This kind of prescription is called translatiue, acquisitive or positive prescription as the right of the late owner is thereby transferred to the adverse possessor.

Many reasons are given in favour of the law of prescription. One reason is public policy. The reason given by Justinian was "the inexpediency of following ownership to be long unascertained". To secure quiet and repose in community, it is necessary that title to property and matters of right in general should not be in a state of doubt and suspense. By directing that the possession of property or enjoyment of a right for a definite length of time confers a good title, uncertainty in regard to ownership is avoided. Another reason given is that by limitation or negative prescription controversies are limited to a fixed period. The lapse of time creates difficulties in regard to the proof of the case by

the parties. The death of parties and witnesses, the loss or destruction of documents and the fading of memory in course of time make it necessary that some time limit must be fixed for instituting legal actions. In the words of Lord Plunkett, Lord Chancellor of Ireland: "Time holds in one hand a scythe and an hourglass in the other. The scythe mows down the evidence of our rights; the hourglass measures the period which renders that evidence superfluous." The law of limitation and prescription repairs the injuries caused by time and ensures justice by supplying the deficiency of proof. Another justification is that occasional injustice is justified on the theory of laches. It is true that sometimes usurpers acquire property and debtors escape payment of their debts. In this way, as honest party may suffer loss but individual loss is justified on the ground that a party who does not assert his claim with promptitude has no right to ask for the help of the state to enforce his right. The law acts upon the maxim that "the law assists the vigilant, not those who sleep over their rights".

### SUGGESTED READINGS

- Austin : *Jurisprudence*.  
Holmes : *The Common Law*.  
Paton : *Jurisprudence*.  
Pollock : *First Book of Jurisprudence*.  
Salmond : *Jurisprudence*.

## XVII

# LIABILITY

### Definition and Nature

According to Salmond : "Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong." According to Markby : "The word liability is used to describe the condition of a person who has a duty to perform." Liability implies the state of a person who has violated the right or acted contrary to duty. However, Austin prefers to use the term 'imputability' to 'liability'. To quote him : "Those certain forbearances, commissions or acts, together with such of their consequences, as it was the purpose of the duties to avert, are imputable to the persons who have forborne, omitted or acted. Or the plight or predicament of the persons who have forborne, omitted or acted, is styled imputability." The liability of a person consists in those things which he must do or suffer. It is the ultimatum of the law and has its source in the supreme will of the State. A person has a choice in fulfilling his duty and his liability arises independently of his choice. It cannot be evaded at all. Liability arises from a wrong or the breach of a duty.

### Kinds of Liability

Liabilities can be of many kinds. Those are civil and criminal liability, remedial and penal liability, vicarious liability and absolute or strict liability.

#### *Civil Liability*

Civil liability is the enforcement of the right of the plaintiff against the defendant in civil proceedings. *Criminal liability* is the liability to be punished in a criminal proceeding. A civil liability gives rise to civil proceedings whose purpose is the enforcement of certain rights claimed by the plaintiff against the defendant. Examples of civil proceedings are an action for recovery

of a debt, restoration of property, the specific performance of a contract, recovery of damages, the issuing of an injunction against the threatened injury, *etc.* It is possible that the same wrong may give rise to both civil and criminal proceedings. This is so in cases of assault, defamation, theft and malicious injury to property. In such cases, the criminal proceedings are not alternative proceedings but concurrent proceedings. Those are independent of the civil proceedings. The wrongdoer may be punished by imprisonment. He may be ordered to pay compensation to the injured party. The outcome of proceedings in civil and criminal liability is generally different. In the case of civil proceedings, the remedy is in the form of damages, a judgment for the payment of a debt, an injunction, specific performance, delivery of possession of property, a decree of divorce, *etc.* The redress for criminal liability is in the form of punishment which may be in the form of imprisonment, fine or death. In certain cases, the remedy for both civil and criminal liability may be the same, *viz.*, the payment of money. In certain cases, imprisonment may be awarded for both civil and criminal liability. Even in a civil case, if a party dares to defy an injunction, he can be imprisoned. Civil liability is measured by the magnitude of the wrong done but while measuring criminal liability we take into consideration the motive, intention, character of the offender and the magnitude of the offence.

### *Remedial Liability*

According to this theory, if a duty is created by law, the latter should see to it that the same is performed. The force of law can be used to compel a person to do what he ought to do under the law of the country. If an injury is caused by the violation of a right, the same can be remedied by compelling the person bound to comply with it. There is no idea of punishment in the theory of remedial liability. However, there are *three exceptions* to the general rule that a man must be forced to do by the force of law what he is bound to do by a rule of law. The first exception is in the case of an imperfect obligation or duty. The breach of an imperfect duty does not give rise to a cause of action. A time-barred debt creates an imperfect duty and the same cannot be enforced by any court of law. The second excep-



tion is in those cases where duties are impossible of specific enforcement. Once a libel or defamation has been committed, its specific enforcement is not possible. Once the mischief has been done, it cannot be undone. The only things that can be done is to make provision against the future. The third exception is in those cases where the specific enforcement of the duty is inexpedient or inadvisable. Law does not enforce the specific performance of a promise of marriage but is prepared to award damages.

### *Penal Liability*

The theory of penal liability is concerned with the punishment of wrong. Punishment is of four kinds *viz.*, deterrent, preventive, retributive and reformative. The chief object of punishment is deterrence. A penal liability can arise either from a criminal or from a civil wrong. There are three aspects of penal liability and those are the conditions, incidence and the measure of penal liability. As regards the conditions of penal liability, it is expressed in the maxim *actus non facit reum, nisi mens sit rea*. This means that the act does not constitute a guilt unless it is done with a guilty intention. Two things are required to be considered in this connection and those are the act and the *mens rea* or the guilty mind of the doer of the act. *Mens rea* requires the consideration of intention and negligence. The act is called the material condition of penal liability and the *mens rea* is called the formal condition of penal liability.

The law deems a person a fit subject for penal discipline when he has committed a prohibited or prescribed act with a guilty mind. An act does not become wrongful unless followed by a guilty mind. There must be two conditions before fixing penal liability. The first condition is the *actus reus* or prescribed act. Salmond calls it the physical or material condition of liability. If there is no act, there can be no punishment. To quote Justice Bryan: "The thought of man cannot be tried, for the devil itself knoweth not the thought of man." Kenny gives the following example: "A man takes an umbrella from a stand at his club with intent to steal it, but finds it is his own." He has committed no offence. The second condition of penal liability is *mens rea* or guilty mind.

An act is punishable only if it is done intentionally or negligently. Intention and negligence are the alternative forms in which *mens rea* can exhibit itself. To quote Austin: "Intention or negligence is an essentially component part of injury or wrong, of guilt or imputability, of breach or violation of duty or obligation.... Intention or negligence is a necessary condition precedent to the existence of that plight or predicament which is styled guilt or imputability." A person is liable to be punished if he does a wrongful act intentionally or negligently. If a wrongful act is done intentionally, penal action will serve as a deterrent for the future. If it is done negligently or carelessly, punishment will make the offender more vigilant and circumspect in future. Punishment is justified only when the doer of a pernicious act exhibits a state of mind that renders punishment effective. In the case of wrongs of absolute liability, a person is punished even without *mens rea*.

An attempt to commit a crime can itself be an offence. A criminal attempt is an act done with the intent of committing a crime. The act already done may be innocent but it becomes punishable because it is done with a guilty mind and is an overt act towards the offence intended. An attempt is made punishable because it creates social alarm which itself is an injury, and the moral guilt of the offender is no less than if he had succeeded in committing the crime. Between preparation and attempt, there is no sharp line of distinction and the question whether it is one or the other depends upon the circumstance of each case.

Where the law presumes that there can be no will at all, no penal liability can be imposed. Children under the age of seven are regarded by law as incapable of having *mens rea*. The same applies to an insane person. In both cases, penal liability cannot be imposed. When the will is not directed to the deed, there can be no liability. This state of mind usually arises from mistake. Mistake to be admitted as a ground of exemption from liability has to satisfy three conditions. The mistake must be such that if the supposed circumstances were real, they would have prevented any guilt from attaching to the person in doing what he did. The mistake should be reasonable. It should relate to a matter of fact and not of law.

*Vicarious Liability*

Ordinarily, only that person is liable for a wrong which he has committed himself. However, there are certain cases where one person is made liable for the wrongs committed by another. Such cases are examples of vicarious liability.

Criminal liability is never vicarious except in very special circumstances. However, civil law recognises vicarious liability in two classes of cases. A master is responsible for the acts of his servants done in the course of their employment. Likewise, legal representatives are liable for the acts of dead men whom they represent.

As regards the liability of a master for the acts of his servants, it is based on the legal presumption that all acts done by his servants in and about his master's business are done by the express or implied authority of the master. Under the circumstances, the acts of the servant are the acts of the master for which he can be justly held responsible. Salmond points out that there are two justifications for the principle of vicarious liability. It is very difficult to prove actual authority and very easy to disprove it in all cases. There are many difficulties in the way of proving the actual authority which is necessary to establish a conclusive presumption of it. Moreover, while employers are usually financially capable of putting up with the burden of civil liability, that is not the case with their servants. If a servant commits any wrong and a suit is filed against him for damages the injured party can never be sure of realizing the damages even if a decree is passed in favour of it. That is due to the financial resources of the servants in general. However, if a decree is secured against the employer, there are better chances of recovering the amount on account of the larger resources of the employer.

The common law maxim was that a man cannot be punished in his grave. Under the circumstances, it was held that all actions for penal redress must be brought against the living offender and must die with him. However, the old rule has been superseded. At present the representatives of a dead man are liable for the wrongs done by him while living. The right of the injured party to receive redress continues against the representatives of the dead

man. This is possible only in civil cases, but in criminal cases, criminal liability dies with the wrongdoer himself.

Vicarious liability is not common in criminal law. A person cannot be punished for a crime committed by another. He may be punished as an abettor of a crime committed by another but in that case he is punished for his own act of abetment and not for the criminal act itself. Section 155 of the Indian Penal Code provides that whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

Under certain Acts, even corporations are held liable under criminal law. The only acts of which the law takes cognisance as the acts of the corporation are those that are connected with the purposes for which the corporation was created. The only acts that can be ascribed to the corporation are those which it is permissible for the corporation to do as being *intra vires* of its memorandum of association. In *Stevens v. Midland Counties Railway Company*, Baron Alderson expressed the view that as a corporation has no mind, it cannot be held liable in any civil action in which malice is a necessary ingredient. In *Abrath v. North Eastern Railway Company*, Lord Bramwell observed that as a corporation cannot have any motive or malice, an action for malicious prosecution cannot be maintained against a company. The number of corporations has increased tremendously and under the new situation, corporations cannot be absolved of criminal liability for the offences committed by them or their agents. The view of Salmond is that corporations can be made liable on the principle of vicarious responsibility. That principle makes a master responsible for the acts of his servants done in the course of their employment. Corporations are persons in the eye of law

and the principle of vicarious responsibility can be extended to them and they can be held liable for the wrongs committed by their agents in the course of their employment. In *Citizens Life Assurance Company v. Brown*, Lindley, J. held that if a libel is published by the servant of a company in the course of his employment, the company can be made liable for it on the principle of agency. To quote him: "If it is once granted that corporations are for certain purposes to be regarded as persons, i.e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals." It is generally agreed that corporations are vicariously liable for the acts of their agents done in the course of their employment even if express malice cannot be proved in the corporation itself.

As the law stands now, a corporation can be indicted for having committed an offence. The present position is the result of many stages. To begin with, when a crime was committed by the orders of a corporation, criminal proceedings could be taken only against the separate members in their personal capacities and the corporation itself was held immune from criminal liability. Later on, an indictment against a corporation was made in the case of offences of non-feasance. That was due to the fact that omission or non-feasance could not be imputable to any individual agent but solely to the corporation itself. Still later on, indictments were made even for misfeasance.

There is no difficulty in indicting a corporation but there may be difficulty in punishing it. A corporation has no soul to be damned. There is a limit to the range of criminal sanctions that can be imposed in case of a corporation. That limit is that a corporation can be prosecuted only for those offences which can be punished by fines inflicted on the corporation. If the orders of a corporation have resulted in serious offences which cannot be punished adequately by fines or penalties, the particular members of the corporation responsible for them should be individually indicted in their own name and punished in their own persons. The acts, whether tortious or criminal, for which corporate property becomes liable, are the acts of the directors or agents of

the corporation. When a corporation is made liable for those acts, the property of the corporation or its shareholders is made liable for those acts. The view of Salmond is that the directors of a corporation are only the agents or servants of the shareholders and there is no violation of natural justice by making the corporate property liable for the acts of the directors of the corporation.

The Indian Penal Code (Amendment) Bill had also proposed some liability for corporations.

### *Absolute or Strict Liability*

Both in civil and criminal law, *mens rea* or guilty mind is considered necessary to hold a person responsible. However, there are some exceptions to the general rule. In those cases, a person is held responsible irrespective of the existence of either wrongful intent or negligence. Such cases are known as the wrongs of absolute liability. In such cases, a person is punished for committing wrongs even if he has no guilty mind. The law does not enquire whether the guilty person has committed the wrong intentionally, negligently or innocently. It merely presumes the presence of the formal conditions of liability. There are many reasons why provision is made for absolute liability but the most important reason is that it is difficult to secure adequate proof of the intention or the negligence of the offender.

The most important *wrongs of absolute liability* fall into three categories, *viz.*, mistakes of law, mistakes of fact and accidents.

(1) Absolute responsibility in the case of a *mistake of law* is based on the legal maxim that ignorance of law is no excuse (*ignorantia juris neminem excusat*). Even if a person commits an offence on account of a mistake of law, that is no excuse in the eye of law. He is liable to be punished although he had no guilty mind at the time of committing the offence. There are many reasons why a mistake of law is not considered as an excuse for committing the offence. Law is the embodiment of common sense and natural justice and hence must be obeyed. Law both can and should be limited in extent. According to Salmond: "The law is in legal theory definite and knowable; it is the duty of every man to know that part of it which concerns him; there-

fore, innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it, because, in general, they can and ought to know it." According to Austin: "The reason for the rule in question would seem to be this. It not frequently happens that the party is ignorant of the law, and that his ignorance of the law is inevitable. But if ignorance of law were a ground of exemption, the administration of justice would be arrested. For, in almost every case, ignorance of law would be alleged. And for the purpose of determining the reality and ascertaining the cause of the ignorance, the courts were compelled to enter upon questions of fact, inscrutable and interminable. . . . That the party shall be presumed peremptory cognizance of the law, or (changing the shape of the expression) that his ignorance shall not exempt him, seems to be a rule so necessary that law would become ineffectual if it were not applied by the courts generally."

However, there are certain *exceptions* to the general rule that the *ignorance of law is no excuse*. The above principle applies only to the general laws and not to any special law. Ignorance of a special law is excusable. No person can be held guilty for the violation of the foreign law of any country. It also does not apply to the rules of equity as developed in England.

(2) In criminal cases, a *mistake of fact* is a good defence against absolute liability. However, in the case of civil law, a mistake of fact involves absolute liability. According to Salmond: "It is the general principle of law that he who intentionally or semi-intentionally interferes with the person, property, reputation or other rightful interests of another, does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstances which justified his act. If I trespass upon another man's land, it is no defence to me that I believed it on good grounds to be my own."

(3) *Inevitable accident* is commonly regarded as a ground of exemption from liability in civil and criminal cases. An accident is either culpable or inevitable. It is *culpable* when it is due to negligence. It is *inevitable* when its avoidance requires a degree of care exceeding the standard demanded by law. There is

one important exception to the above rule in civil law. There are cases in which law provides that a man shall act at his peril and shall take his chance if an accident happens. If a person keeps wild beasts, lights a fire, constructs a reservoir of water, accumulates upon its land any substance which can do damage to his neighbours if it escapes or erects dangerous structures by which passengers on the highway can be harmed, he does all these things at his peril and has to pay damages to the injured parties. In the case of *Rylands v. Fletcher*, it was held: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he is responsible. If it does escape, and causes damage, he is responsible, however careful he may have been and whatever precaution he may have taken to prevent damage."

### General Conditions of Liability

Certain general conditions must be satisfied before liability can arise. Those conditions are the act, omission or forbearance contrary to law on the part of the person liable which causes injury, *mens rea* or guilty mind or the breach of strict duty on the part of the wrongdoer and the consequences which may take the form of damage or harm to the injured person.

#### Act

An act has been defined as a muscular contraction but such a definition is not suitable for penal liability. A muscular contraction may be due to a disease and there can be no penal liability for the same.

According to Salmond, "an act is any event subject to human control". According to Austin, an act is a bodily movement caused by volition which is a movement of the human will. According to Holland, an act is a determination of will which produces an affect in the sensible world.

Acts can be classified variously. An internal act is an act of the mind and an external act is an act of the body. An external act always involves an internal act but an internal act does not necessarily involve an external act. Internal and external acts are also known as inward and outward acts. According to Hol-



land, mere determinations of the will are inward acts. Determination of will which produces an effect on the world of senses is called an outward act. Jurisprudence is concerned only with outward acts.

Acts may be positive or negative. A positive act is one in which something is actually done. A negative act is one where something is refrained from being done. Positive acts are acts of commission and negative acts are called forbearances.

An act may be intentional or unintentional. An intentional act is one whose result is foreseen and desired by the doer. An unintentional act is one whose result is not foreseen or desired. In both these cases, the act may be external or internal or positive or negative. An act is not necessarily confined to intentional acts. It may also be unintentional.

Examples may be given to illustrate the above categories of acts. If a person shoots a bird, his act is positive and intentional. *X* has an intention of killing *Y*. It is an internal act. If he buys a pistol with that intention, his act is both positive and intentional. *X* owes money to *Y* and does not pay the same in spite of demand. The act of *X* is negative and intentional. I am invited to a dinner. If I do not go to the dinner intentionally, my act is negative and intentional. If I miss the dinner because I forgot all about it, my act is negative and unintentional.

*Factors of an act*: According to Salmond, every act is made of three parts viz., the mental and bodily activity of the doer, the circumstances and the consequences. If a person is murdered, many things are done before the murder takes place. First of all comes the idea in the mind of the murderer to murder a person. Then he has to plan as to how the murder is to be committed. The pistol has to be brought or somehow secured. The same is the case with cartridges. Then the occasion has to be found for shooting the person. The person must be shot at the place where the shot is likely to be fatal. There are some writers who take into account only the immediate consequences of the act and not the incidental ones. According to Austin: "The bodily movements which immediately follow our desire of them are the only acts strictly

and properly so-called." However, such a view is not accepted as being illogical. An act must include not only the physical movements but also the circumstances and results of the act. According to Holland, the essential elements of an act are an exertion of the will, an accompanying state of consciousness and manifestation of the will.

*Juristic acts*: According to Holland, a juristic act is "a manifestation of the will of private individual directed to the origin, termination or alteration of rights". According to another definition, a juristic act is "an act the intention of which is directed to the production of a legal result"

*Wrongful acts*: Wrongful acts are those which are considered to be mischievous in the eye of law. Wrongful acts are of two kinds. There are wrongful acts which are actionable *per se* without proof of actual damage. There are others where actual damage has to be proved before the offender can be punished. Examples of such wrongful acts are slander, negligent driving, etc.

*Damnum sine injuria*: There can be cases in which damage is caused but no injury is recognized in the eye of law. All wrongs are mischievous acts but all mischievous acts are not wrongs. The immunity from liability is due to the fact that while some harm is done to an individual, a greater good is done to society at large. This is so in the case of competition in trade or business. It is possible that a particular businessman may be completely ruined on account of competition but he cannot go to court of law and demand damages. Fair competition does not create any liability. Sometimes, the offence committed is so trivial, indefinite and difficult to prove, that it is not considered desirable to take action against the offender. It is difficult for law to measure the amount of mental pain or anxiety suffered by a particular person. There is also no liability if a person drains the well of a neighbour by digging another well on his land. Likewise, if a person steals a few grains of wheat, law does not take notice of it.

*Injuria sine damnum*: There are cases which are actionable even if there is no proof of actual damage. This happens when

a legal right is violated. It is not considered necessary to prove that actual damage has been suffered by the plaintiff. In the case of *Ashby v. White*, the plaintiff was a qualified voter for a parliamentary seat. He was not allowed to vote by the returning officer. However, the person for whom he wanted to vote, was duly elected to Parliament. In spite of that, the plaintiff filed a suit against the returning officer. The suit was decreed in his favour on the ground that refusal to record the vote of the plaintiff caused an injury to the plaintiff in the eye of law.

### *Circumstances of the act*

It is necessary to take into consideration the time and place of the commission of the act. It is important to know as to where the act was commenced and where the same was completed. These facts help to determine the jurisdiction of the court which has to try the offence.

### *Mens rea (guilty mind)*

A fundamental principle of criminal law is that a mere act does not constitute a crime. It requires a guilty mind or *mens rea* behind it. This principle is based on the maxim *actus non facit reum, nisi mens sit rea*, which means that an act does not make guilty unless there is a guilty mind. Two conditions must be satisfied before a criminal liability can be imposed. The first condition is a physical condition which means the existence of an unlawful act. The second condition is the *mens rea* or the guilty mind. Unless and until both conditions are present at the same time, no criminal liability arises. A guilty mind must consist of either intention or negligence. Very often, even knowledge of the consequences will be considered as a part of the guilty mind because the mental condition of an individual can be ascertained only through his conduct and it is rather difficult to ascertain whether it is done intentionally or with the knowledge of the consequences. The guilty mind does not depend generally on the nature or motive behind the act. Guilt has to be in the immediate intent or negligence. *Mens rea* must extend to the three parts of an act *viz.*, the physical doing or not doing, the circumstances and the consequences. If *mens rea* does not extend to any part of the act, there should be no guilty mind behind the act. The act

of shooting involves all the three factors. There is physical doing or omitting to do. A person is in the range of the revolver and the revolver is also loaded. As regards the consequences, the trigger falls, the bullet is discharged and it enters the body of the victim.

Where the law prohibits an act, it prohibits it in respect of its origin, its circumstances and its consequences. Out of the numerous circumstances and the endless chain of consequences, law selects some as material and they alone constitute the wrongful act, the rest being irrelevant. In the case of the offence of theft, time of the day when it is committed is irrelevant, whereas in the case of the offence of housebreaking, the hour during which it is committed becomes relevant in assessing the magnitude of the liability of the offender. Section 456 of the Indian Penal Code considers housebreaking by night as an aggravated offence, whereas mere housebreaking not at night as a lesser offence.

In *Nathulal v. State of Madhya Pradesh*, the Supreme Court of India has observed that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of *mens rea*, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof. An offence under Section 7 of the Essential Commodities Act, 1955 for breach of Section 3 of the Madhya Pradesh Food-grains Dealers Licensing Order, 1958 necessarily involves a guilty mind as an ingredient of the offence. Considering the scope of the Act, it would be legitimate to hold that an offence under Section 7 of the Act is committed by a person if he intentionally

contravenes any order made under Section 3 of the Act. The object of the Act will be best served and innocent persons will also be protected from harassment if Section 7 is so construed. (AIR 1966 SC 43).

In *Srinivas Mall Bairoliya v. Emperor*, the Privy Council held that it is of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of the crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Offences under Rule 81(2) of the Defence of India Rules, 1939 dealing with the vicarious liability of master for servant's crime are not within the limited and exceptional class of offences which can be held to be committed without a guilty mind. Offences which are within that class are usually of a comparatively minor character and a person who was morally innocent of the blame cannot be held vicariously liable for a servant's crime involving contravention of Rule 81(2) and so punishable with imprisonment for a term which may extend to three years. (AIR 1947 PC 135).

The view of Sir J. Stephens is that the doctrine of *mens rea* is misleading. It originated when criminal law practically dealt with offences which were not defined. This law gave them certain names such as murder, burglary, rape and left any person who was interested in the matter to find out what those terms meant. Such a person found that the crime consisted not merely in doing a particular act such as killing a man or taking away the purse of another person but doing it with a particular knowledge or purpose. This principle of mental condition is generalised by the term *mens rea*. However, we have today come a long way from that stage and each crime has a precise definition. Hence, at a stage of criminal law where every offence has been well defined, the general doctrine of *mens rea* is misleading and unnecessary.

The doctrine of *mens rea* does not find any place in Indian Penal Code. To quote J. D. Mayne, the author of *Criminal Law in India*: "Every offence is defined and the definition states not only what the accused must have done, but the state of his

mind with regard to the act when he was doing it." For example, theft must be committed dishonestly. Cheating must be committed fraudulently. Murder must be committed either intentionally or knowingly. There is no room for the general doctrine of *mens rea* in the Indian Penal Code. Each definition of the offence is self-sufficient. All that the prosecution has to do in India is to prove that a particular act committed by the accused answers the various ingredients of the offence in the particular section of the Indian Penal Code.

Persons who are permanently or temporarily incapable of a guilty mind are not considered liable for their acts. In the case of drunkenness and insanity, the offender is considered to be incapable of forming the necessary intention which constitutes a crime. Likewise, nothing is an offence which is done by a child under 7 years of age under the Indian Penal Code. In the case of a child between 7 and 12, he is considered liable only if he has attained a sufficient maturity of understanding and can judge the nature and consequences of his actions.

However, in certain circumstances, law does not take into consideration *mens rea* at all. An offender is held liable independently of any wrongful intention or culpable negligence. Such wrongs are called the wrongs of absolute liability or strict liability and they are exceptions to the doctrine of *mens rea*. The number of wrongs of absolute liability is increasing every day. The tendency is to impose responsibility for loss or damage whether the wrongdoer has a guilty mind or not. The rule of absolute liability is of very wide application.

*Mens rea when not essential.*—There are many exceptional cases where *mens rea* is not required in criminal law.

(1) Where a statute imposes liability, the presence or absence of a guilty mind is irrelevant. Many laws passed in the interest of public safety and social welfare impose absolute liability. This is so in matters concerning public health, food, drugs etc. There is absolute liability in the licensing of shops, hotels, restaurants and chemists' establishments. The same is true of cases under the Motor Vehicles Act and the Arms Act. Although strict liability

is imposed in these cases, courts are expected to protect, as far as possible, the liberty of the subjects and to satisfy themselves that a particular statute clearly imposes absolute liability.

(2) Another exception is where it is difficult to prove *mens rea* and penalties are petty fines. A statute may do away with the necessity of *mens rea* on the basis of expediency. In such petty cases, speedy disposal of cases is necessary and the proving of *mens rea* is not easy. An accused may be fined even without any proof of *mens rea*.

(3) Another exception to the doctrine of *mens rea* is in cases of public nuisance. In the interest of public safety, strict liability must be imposed. Whether a person causes public nuisance with a guilty mind or without a guilty mind, he must be punishable.

(4) Another exception to the doctrine of *mens rea* is to be found in those cases which are criminal in form but are in fact only a summary mode of enforcing a civil right. According to Lord Watson: "The law of England does not take into account motive constituting an element of civil wrong. Any invasion of the civil rights of another person is itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injuries to the person whose right is infringed whether the motive which prompted it be good, bad or indifferent." Lord Macnaughten writes: "It is the act, not the motive or the act, that must be regarded. Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable." Lord Herschell observes: "It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motives which dictated it." In the case of *Bradford v. Pickles*, it was held that "no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or malicious."

*Exceptions.*—There are certain *exceptions to the general rule* that wrongful motive is immaterial in a civil wrong and those are malicious prosecution, injurious falsehood, defamation on a privileged occasion and conspiracy. The term malicious ordinarily means illwill or spite, but in the eye of law it implies a wrongful intention and wrongful motive. A malicious wrong is either intentional or wrong done with a wrongful motive. Malicious prosecution means a prosecution based on a wrongful motive. If a person is to be held guilty of malicious prosecution, it must be proved that he had ulterior intent of a wrongful nature. Motive is also relevant in certain cases of defamation. If the defendant takes up the plea of privilege in a defamation case, he can succeed only if he proves that he had no bad motive.

In certain offences, a particular motive is prescribed as an ingredient of the offence. In those cases, motive also becomes relevant, for example, a person enters the property of another person with the motive of annoying or intimidating any occupant of that property, it amounts to criminal trespass. However, if he enters the property without any such motive, there is no criminal trespass but only a civil trespass for which remedy is only damages.

While deciding the sentence to be imposed upon an accused person, the court takes into consideration the motive with which the offence was committed. If a father steals a loaf of bread to feed his child, he is shown leniency at the time of punishment. However, if he removes the ornaments of a child, he is punished severely. It is obvious that the motive with which the offence is committed is relevant in certain cases.

Another exception to the doctrine of *mens rea* is related to the maxim "ignorance of the law is no excuse". If a person violates a law without the knowledge of the law, it cannot be said that he has intentionally violated the law, though he has committed an act which is prohibited by law. In such cases, the fact that he was not aware of the rule of law and hence did not intend to violate it, is no defence and he would be liable as if he was aware of the law. Blackstone writes: "A mistake in point of law which every person of discretion not only may, but is bound and



presumed to know is, in criminal cases, no sort of defence." The reason is that a man could have known the law if he had taken care to do so. Moreover, law is mainly based on logic, principles of natural justice and conscience. Even where law is complicated, legal advice can be taken from those who are competent to give.

*Transferred malice.*—There is a principle of criminal law that no act is intended unless all the three aspects of the act are intended. An exception to this principle is the doctrine of transferred malice or transmigration of malice. If a person intends to cause the death of *R*, and in his attempt to cause the death of *R*, he kills *S*, he would be guilty of having committed the murder of *S* though he did not intend to kill him. The general intention to kill is transferred or is transmigrated to the intention of killing this particular person. Section 301 of the Indian Penal Code provides that if a person by doing anything which he intends or knows to be likely to cause death commits culpable homicide by causing death of any person whose death he neither intends nor knows himself likely to cause, he shall make him liable as if he had caused the death of the person whose death he intended or knew himself likely to cause.

*Presumption of Innocence.*—What this rule means is that everyone is presumed to be innocent till he is proved to be guilty. A person who is accused of a crime is not bound to make any statement or offer any explanation of the circumstances which throw suspicion on him. He stands before the court as an innocent person till he is proved to be guilty. It is the duty of the prosecution to prove that he is guilty. He need not do anything but stand by and see what case has been made out against him. It is the duty of the prosecution to prove the guilt beyond reasonable doubt without any help from the accused.

However, if the defence of the accused is that he falls within one or more of the General Exceptions of the Indian Penal Code, the burden of proof is on him to prove that his case is covered by such exception or exceptions. After the prosecution proves that the death of *A* was caused by a bullet from a gun in the hand of *B*, it is open to *B* to prove that he was acting in self-defence.

It is the duty of the defence counsel to show that when the bullet went off, *B* was merely acting in self-defence.

The doctrine of presumption of innocence has undergone considerable modification. There are various statutes which negative the presumption of innocence. The Prohibition Acts, the Weights and Measures Act, the Prevention of Adulteration of Food Act etc restrict the application of the doctrine of presumption of innocence to a considerable degree. Under those Acts, it is not necessary for the prosecution to prove that the accused is guilty beyond reasonable doubt. Once the prosecution makes out a *prima facie* case, the burden is on the accused to prove that he is innocent.

Under the Indian Penal Code, there are certain offences relating to trade mark, property mark and currency notes where the burden of proof or innocence is shifted on the accused, in particular, in the following cases :

- (1) Section 486 provides that any person selling goods marked with counterfeit trade mark or property mark shall be punished unless he proves that he acted innocently and had also taken all reasonable precautions.
- (2) Section 487 lays down that any person making a false mark upon any receptacle containing goods shall be punished unless he proves that he acted without intent to defraud.
- (3) Section 488 provides any person using such false mark shall be punished unless he proves that he acted without the intent to defraud
- (4) Section 489-E lays down that any person making or using documents resembling currency notes or bank notes shall be punished and if his name appears on such documents, it shall be presumed that he made the document until the contrary is proved.

#### *Stages in the Commission of a Crime*

The commission of every offence has four stages *viz.*, intention to commit it, preparation for its commission, attempt to commit it and its commission.

*Intention.*—As regards the intention to commit, it does not constitute an offence if it is not followed by an act. The will is not to be taken for the deed unless there is some external act which shows that progress has been made in that direction or towards maturing and effecting it. For example, *R* comes to know that *S* intends to shoot *T* the next day in *X* Square at 8 p.m. *R* informs the police about it. The following day *S* is arrested in *X* Square a few minutes before 8 p.m. On his search, he is found in possession of a fully loaded revolver. In this case, *S* had not committed any offence (assuming that he had a valid licence for the revolver). He had so far merely intended to shoot *T*.

*Preparation.*—Preparation consists in devising means for the commission of an offence. Section 511 of the Indian Penal Code does not punish acts done in the mere stage of preparation. Mere preparation is punishable only when the preparation is to wage war against the State (Section 152) or to commit dacoity (Section 399). Before a person passes beyond the stage of preparation and reaches a point where he commits an offence, he may give up the idea of committing the crime. In that case, he is not punishable under the Indian Penal Code. Law allows a *locus penitentiae* and will not hold that a person has attempted to commit a crime until he has passed the stage of preparation. A person who contemplates murder buys a pistol and takes a railway ticket to the place where he expects to find his victim. As he has not gone beyond the stage of preparation, he is not guilty of any offence.

*Attempt.*—As regards attempt, it is the direct movement towards the commission after preparations are made. For the offence of attempt, there must be an act done with the intention of committing an offence. An attempt can only be manifested by acts which would end in the consummation of the offence but for the intervention of circumstances independent of the will of the party. An attempt is possible even when the offence attempted cannot be committed. For example, a person intending to pick the pocket of another thrusts his hand into the pocket, but finds it empty.

If the attempt to commit a crime is successful, the crime itself is committed. Where attempt is not followed by the intended consequences, Section 511 of the Indian Penal Code applies. A person intends to set a rick of corn on fire. He takes out a cigarette, lights it and blows out the match. The act of lighting a match was a direct overt act converting preparation into attempt. The man had committed an offence of attempt to set fire to the rick.

There is an important difference between preparation to commit an offence and attempt to commit an offence. Preparation consists in devising or arranging the means or measures necessary for the commission of an offence. Attempt is the direct movement towards the commission after the preparations are made. R may purchase and load a gun with the declared intention to shoot his neighbour. However, until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt.

An attempt is made punishable because every attempt, whether it fails or succeeds, must create alarm which itself is an injury. The moral guilt of the offender is the same as if it had succeeded. Moral guilt must be united to injury in order to justify punishment.

*Commission of crime.*—The last stage in the commission of a crime is that it is successfully committed and the consequences of the crime materialise.

### *Jus Necessitatis*

*Necessitatis non habet legem* means that necessity knows no law. The meaning of this maxim is that if an act is done under dire necessity in circumstances where no fear of punishment would deter the person from so acting, he would not be punished severely. Where circumstances so warrant, he ought not to be punished at all. In such cases, law should take into consideration not the immediate intent but the ulterior intent which means the motive with which the act was done. Punishment has a deterrent effect when the wrongdoer has a choice, but if he is under the compelling influence of a motive which is of such strength that

it overcomes any fear that can be inspired by deterrent punishment, then punishment becomes futile. Where threats are necessarily ineffective, they should not be made. If such threats are given effect to, it would be infliction of fruitless and uncompensated evil. Hobbes writes: "If a man by the terror of present death be compelled to do a fact against the law, he is totally excused because no law can oblige a man to abandon his own preservation."

The common illustration of the right of necessity is the case of two shipwrecked drowning men clinging to a plank that will not support more than one of them. If one of them pushes the other off the plank to save himself from drowning, the question would be whether the person who pushed the other would be justified in doing so? Though he intentionally pushed the other man away, will the motive of self-preservation absolve him from penal liability? According to the doctrine of *jus necessitatis* the person would not be liable.

Another familiar case of necessity is that in which shipwrecked sailors are driven to choose between death by starvation on the one side and murder and cannibalism on the other. A third case is that of a crime committed under the pressure of illegal threats of death or grievous bodily harm. In such cases, morality demands that no punishment be administered. It seems morally unjust to punish a man for doing something which he or any ordinary man could not morally resist doing, even given the countervailing motive of the maximum punishment reasonable for the offence.

Where necessity involves a choice of some value higher than the value of obedience to the letter of the law, it is always a legal defence. However, where the issue is merely one of futility of punishment, evidential difficulties prevent any but the most limited scope being permitted to the *jus necessitatis*. While in few cases necessity is admitted as a ground of excuse, as for example in treason, it is in most cases regarded as relevant to the measure rather than to the existence of liability. It is acknowledged as reason for the reduction of penalty, even to a nominal amount, but not for its total remission. Homicide in the blind fury of

irresistible passion is not innocent, but neither is it murder. It is reduced to the lower level of manslaughter. Shipwrecked sailors who kill and eat their comrades to save their own lives are in law guilty of murder itself, but the clemency of the Crown will commute the sentence to a short term of imprisonment.

The leading case on the subject is that of *R. v. Dudley*, (1884) 14 QBD 273. It was held in that case that a man who in order to save his life from starvation, kills another for the purpose of feeding on his flesh is guilty of murder, although at the time of the act he is in such circumstances that there is no other chance of preserving his life. Three shipwrecked sailors in a boat were without food for seven days and two of them killed the third, a boy, and fed on his flesh under such circumstances that there appeared to the accused every probability that unless they fed upon the boy or one of them, they would die of starvation. In the circumstances, the court held that they were guilty of murder. Though the court convicted the accused of murder and sentenced him to death, pardon was recommended and granted. In English criminal jurisprudence, *jus necessitatis* may be relevant for assessing the measure of liability but it is not a ground for releasing a person from all penal liability. Both English criminal law and the Indian Penal Code do not accept the doctrine of *jus necessitatis* as well as the doctrine of self-preservation.

### *Intention*

The *mens rea* which is essential to constitute a liability takes two distinct forms viz., wrongful intention and culpable negligence. According to Salmond, intention is "the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire of it, such fore-knowledge and desire being the cause of the act". According to Paton, a wrong is intentional only where the particular consequences which result from the act are foreseen and desired. Knowledge and desire are the necessary constituents of intention. According to Justice Holmes: "Intent will be found to resolve itself into two things; foresight that certain consequences will follow from an act and the wish for those consequences working as a motive which induces the act."

Intention does not necessarily involve expectation. The consequences desired may not be expected. I may intend certain consequences which are absolutely improbable. Likewise, expectation does not amount to intention. A surgeon may know that his patient was likely to die in the course of operation but he intends the recovery of his patient and not his death. Intention implies full advertence in the mind of the person to his conduct. An intention can only be inferred from the conduct of the doer. There is no other better method to do so. According to Brain, C. J. : "It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man." According to Bowen, L. J. : "The state of man's mind is as much a fact as the state of his digestion."

The doer of an act is imputed the desire as to its inevitable consequences although those may not be present in his mind. A person causes grievous hurt to another with no intent to kill him. However, if the person dies, the offender is guilty of murder. Intention excludes negligence as negligence refers to unintended consequences of action. Generally, intention and knowledge go together. If a person intends a result, he knows that the result will follow the act. When he knows that a particular result will follow, he intends that result. However, this is not always the case. A General may order his troops to run in front of a firing machine-gun and capture the same, but he does not desire or intend their death. *X* shoots at *Y* who is actually out of the range of his gun. The intention to kill is there but there is the knowledge that *Y* will not be killed as he is out of the range of the gun.

*An intention differs from motive* An act may be done with one immediate intent and another ulterior intent. The *ulterior intent* is called *motive*. *A* kills *B* to rob him of his luggage. The immediate intent is to kill *B* and the motive is to rob him. Sometimes the immediate intent may be bad but the ulterior intent may be good. In spite of that, the act will be a wrongful one. Likewise motive may be bad but the act may not be wrongful. This is so if a person opens a shop in competition against another and is prepared to sell his goods at a cheaper rate with a view to ruin

the other. Where a person saves a drowning man, the intention of the person is to save him, but his motive may be to have him arrested under a warrant. Motive is said to be the ulterior intent.

*Malice*: Malice implies wrongful intention. An act is done maliciously if it is done with a bad intention or a bad motive. Malice includes immediate and ulterior intention. Malicious prosecution implies a prosecution which is inspired by motive not approved of by law. It is only in exceptional cases that malice is considered to be relevant in determining the question of legal liability.

*Negligence*: According to Salmond, negligence is "the state of mind of undue indifference towards one's conduct and its consequences". According to Willes, negligence is "the absence of such care as it was the duty of the defendant to use". According to Austin, negligence is the breach by omission of a positive duty. In his definition of negligence, Holland includes all those shades of inadvertence which result in injury to others but there is a total absence of responsible consciousness on the part of the doer. Negligence can consist either *in faciendo* or *in non faciendo*; being either non-performance or inadequate performance of a legal duty. According to Clark: "Negligence is the omission to take such care under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea and has nothing to do with a state of mind." According to another writer, "negligence is the absence of care according to circumstances". It has been held in a case that "negligence is the omitting to do something that a reasonable man would do or the doing of something which a reasonable man would not do". Negligence is the breach of a legal duty to take care. It is carelessness in a matter in which carefulness is made obligatory by law. Negligence essentially consists in the mental attitude of undue indifference with respect to one's conduct and its consequences. Negligence is nothing short of extreme carelessness. Carelessness excludes wrongful intention. A thing which is intended cannot be attributed to carelessness. Carelessness or negligence does not necessarily consist in thoughtlessness or inadvertence. It is true that it is the commonest form of negligence but it is not the only form. There can be a form of



negligence in which there is no thoughtlessness or inadvertence. The essential of negligence is not inadvertence but indifference. A careless person is a person who does not care. To quote Salmond : "This term has two uses ; for, it signifies sometimes a particular state of mind and at other times conduct resulting therefrom. The former is the subjective and the latter objective sense. In the former sense, negligence is opposed to wrongful intention ; in the latter, it is opposed not to wrongful intention but to intentional wrongdoing."

Salmond uses the term negligence only in the subjective sense. According to him, negligence is essentially a state of mind. Negligence has a wider significance than inadvertence and thoughtlessness.

Negligence is of two kinds, according as it is accompanied by inadvertence or not. *Advertent negligence* is commonly called wilful negligence or recklessness. *Inadvertent negligence* can be called simple negligence. In the case of advertent negligence, the harm done is foreseen as probable but it is not willed. In the case of inadvertent negligence, the harm done is neither foreseen nor willed. In either case, carelessness or indifference as to the consequences is present. In the case of advertent negligence, the indifference does not prevent the consequences from being foreseen but in the case of inadvertent negligence the indifference does prevent the consequences from being foreseen.

According to some critics, negligence is not carelessness or indifference in all cases. However, the reply is that this view is not sound. In all cases which apparently show that there exists negligence without indifference, a careful examination discloses the presence of indifference. A drunkard is walking along the road and he breaks a shop window as he knocks against the same. The drunkard has to pay damages on account of negligence. It is true that the drunkard was taking all precautions to avoid any mishap, but he was liable for the loss as he was indifferent when he got himself drunk and started walking in the street in a state of drunkenness. He ought to have remained sober. X was an inefficient physician. In spite of all his devotion and care, he could

not save the life of the patient on account of his inefficiency. He was held liable for damages for negligence. It is true that he was very careful in his work but he ought not to have undertaken the same as he was unfit to do so.

*Negligence and Inadvertence*: A distinction is also made between gross negligence and slight negligence. Gross negligence implies a higher degree of negligence than that of the latter. There is no such distinction in English law. Negligence is called wilful if it is advertent. It is also called recklessness. In this kind of negligence, the harm done is foreseen as possible or probable but it is not willed. In the case of an inadvertent negligence, the harm is neither foreseen nor willed.

According to some jurists, all negligence consists in inadvertence. An act is done negligently when the doer did not know that the act was wrong but could have found out if he had tried to do so. Two objections are raised by Salmond against this view. According to him, all negligence is not inadvertent. Even if a thing is known to be wrong, I may do the same with the hope that it will not result in wrong. I may have no intention that it should result in wrong. I may drive fast through a crowded street hoping that it will not result in any accident. Likewise all inadvertence is not negligence. I may not appreciate the consequences of my actions and that way I may not be negligent. I become negligent only if I become indifferent to results. I am not negligent if I take full care which can reasonably be expected under the circumstances. A man driving a car is negligent as he does not take care to remain sober.

*Negligence and Intention*: According to Salmond, both intention and negligence are subjective. Both of them arise out of a state of mind. Intention is a mental element and the same is the case with negligence.

However, in the case of intention, the consequences of the act are both known and desired by the doer. In the case of negligence, the consequences of a negligent act are neither desired nor willed whether they are known or not. In the case of intention, it is presumed by law that the doer intends the natural consequences of his act. Intentional wrong is punished as the

injury is willed or desired. A negligent wrong is punished as the prevention of the injury is not sufficiently desired. The wrongdoer is liable because he is careless or indifferent. *X* fires at *Y* and kills him. The wrong is intentional as the death was desired. *X* fires in the direction of a crowd believing that the shot will not go as far as *Y*. Anyhow, *Y* is killed by his shot. *X* is guilty of negligence.

*Culpable Negligence* : Carelessness becomes culpable when law imposes a duty of being careful. Criminal liability for negligence exists only in very exceptional cases. However, civil liability for negligence exists in most cases. There are certain exceptions to the above rules. A false statement is not a civil wrong if the person who made the statement honestly believed the same to be true. It is immaterial that he was careless in seeking the truth. An animal or a thing is borrowed gratuitously and if any damage is done to the borrower on account of dangerous defect in the animal, the borrower is entitled to recover the damages if he is not duly informed of the defects. While measuring the degree of carelessness, two things are taken into consideration and those are the degree of the seriousness of the consequences possible and the extent to which those consequences were probable.

*Duty of care* : A reference can be made to some cases to have a clear idea of the duty of care involved in the term negligence. In the case of *Donoghue v. Stevenson*, a manufacturer of ginger beer sold to a retailer ginger beer in an opaque bottle. The bottle contained the decomposed remains of a dead snail. However, that fact was not known to the manufacturer. The ginger beer was bought by a customer from the retailer and he poured some of it into a tumbler for a lady friend who drank it and became very ill. It was held that the manufacturer owed a duty to take care that the bottle did not contain any noxious matter and he was liable if the duty was broken. In another case, the defendants manufactured pants which contained some chemical that gave the plaintiff a skin disease when he wore them. It was held that the defendants were liable to the ultimate purchaser.

*Standard of care*.—According to Salmond, English law recog-

nises only one standard of care and only one degree of negligence. Whenever a person is under a duty to take any care at all, he is bound to take that amount of it which is considered reasonable under the circumstances and the absence of which is culpable negligence. Many attempts have been made to establish two or even three standards of care and degrees of negligence. Some writers distinguish between gross negligence and slight negligence. There are others who distinguish between gross, ordinary or slight negligence. These distinctions are based partly on Roman law and partly on a misunderstanding of Roman law. The distinctions are hopelessly indeterminate and impracticable. Salmond does not approve of those distinctions and contends that there is no reason or justice or expediency for doing so. To quote him: "The single standard of English law is sufficient for all cases. Why should any man be required to show more care than is reasonable under the circumstances or excused if he shows less?"

It is possible to adopt either of the two standards of care want of which amounts to negligence. Those *two standards* are the *highest degree of care of which human nature is capable* and the *amount of care which would be reasonable in the circumstances of the particular case*. The first standard is rejected and the second standard is accepted in actual practice. Law requires not what is possible but what is reasonable under the circumstances. Law does not require the greatest possible care in every case as all persons do not possess the highest degree of intelligence. Likewise, the standard of care required is not the care that can be exercised by the ordinary man or the average man. In some cases the standard adopted has been lower than the amount of care which a man of average prudence exercises. The standard of care is not the amount of care which the individual concerned would be capable of exercising in the circumstances or the amount of care which at the utmost it is possible for him to exercise.

Theoretically, negligence is the omitting of that which a reasonable man would do or the doing of that which a reasonable man would not do. However, in actual practice it is hard to define or discover that reasonable man or lay down any rule defining the amount of care necessary in any particular case. In the case of England, that amount of care is reasonable in the

circumstances of a particular case which a jury of 82 men or the judge thinks ought to have been observed in that case. *The standard of care cannot be predetermined. It is a variable thing which varies from case to case and time to time.*

While determining the amount of care necessary in any particular case, two factors must be taken into consideration. Those are the magnitude of risk to which others are exposed by the act and the amount of benefit to be derived from the act. If the driver of a car drives it at the speed of 40 miles an hour in the city, he is considered to be guilty of negligence. The danger of accidents arising out of high speed in the city is much greater than the benefit derived by the car-owner. However, if a train is run at the speed of 50 miles an hour and accidents take place from time to time, it is not considered to be negligence as the benefits enjoyed by the public on account of high speed are much greater than the risk of accidents. In the case of an architect, a physician or a surgeon, he is not required to exercise the skill of an ordinary man or an average man. He must possess special skill before he takes up work. If he starts his work without acquiring the necessary skill required by law, he is liable to be held guilty for negligence.

*Theories of Negligence* —There are many theories of negligence expounded by various jurists.

(1) According to Austin, negligence consists essentially in *inadvertence*. It consists in a failure to be alert, circumspect or vigilant. A negligent wrongdoer is one who does not know that his act is wrong but who would have known it if he had not been mentally indolent. According to Salmond, this theory is inadequate. All negligence is not inadvertence. There is such a thing as advertent negligence in which the wrongdoer knows perfectly well the true nature, circumstances and probable consequences of his act. He foresees those consequences and yet does not intend them. His mental attitude is not one of intention but of negligence. Moreover, all inadvertence is not negligence. A failure on the part of a person to appreciate the nature of an act and foresee its consequences, is not culpable in itself. There is no justification for liability unless it is shown that there was careless-

ness in the sense of undue indifference. He who is ignorant or forgetful is not negligent. The signalman who sleeps at his post is negligent not because he falls asleep, but because he is not sufficiently anxious to remain awake. If his sleep is due to illness or excessive labour, he is free from blame. *The essence of negligence is not inadvertence but carelessness* which may or may not result in *inadvertence*. The advocates of the theory point out that there are in reality three forms of *mens rea* and not two and those are intention, recklessness and negligence. In the case of intention, the consequences are foreseen and intended. In the case of recklessness, the consequences are foreseen but not intended. In the case of negligence, the consequences are neither foreseen nor intended. However, law brackets together recklessness and negligence under the head of negligence as both of them are the outcome of carelessness.

(2) According to Holland, negligence is of two kinds, gross negligence and simple negligence. However, this view is an old one and not recognised by English law.

(3) Sir John Salmond has propounded the *subjective theory of negligence*. According to him, negligence is purely subjective. It is something which is purely internal to the individual concerned. It relates to his state of mind. It is a mental condition. It is an attitude of indifference to the consequences of the act. Negligence is culpable carelessness. Although negligence is not the same thing as thoughtlessness or inadvertence, it is nevertheless essentially an attitude of indifference. Negligence consists in the mental attitude of undue indifference with respect to one's conduct and its consequences. According to Winfield: "As a mental element in tortious liability, negligence usually signifies total inadvertence of the defendant to his conduct and for its consequences. In exceptional cases, there may be full advertence to both the conduct and its consequences. But in any event, there is no desire for the consequences, and this is the touchstone for distinguishing negligence from intention."

(4) According to the *objective theory of negligence*, negligence is not a subjective fact. It is not a particular state of mind but a particular kind of conduct. It is a breach of the duty of taking

care against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct. To drive at night without lights is negligence because all reasonable and prudent men carry lights with a view to avoid accidents. To take care is not a mental attitude or a state of mind.

According to the objective theory, negligence is an external fact and not a state of mind. It is a conduct resulting in the breach of duty to take care. According to Clark and Lindsell: "Negligence consists in the omission to take such care as under the circumstances it is the legal duty of a person to take." Negligence lies in pursuing a course of conduct different from that of a reasonable and prudent person.

According to Pollock: "Negligence is the contrary of diligence and no one describes diligence as a state of mind." Negligence is the breach of the duty of taking care against the harmful results of one's actions and to refrain from unreasonable dangerous kind of conduct.

In the law of torts, negligence consists in the failure to take such care as would be taken by a reasonably prudent man. It is a conduct which falls short of an external standard and is an objective one.

Salmond criticizes the objective theory of negligence and points out that negligent conduct differs from negligence. Negligent conduct is a course of action which is the result of negligence. It is an objective fact which results from a state of mind. Moreover, all negligence is followed by a failure to take reasonable precautions. However, the converse is not true. The failure to take precautions is not always due to negligence. It may be due to accident or intention. From the purely objective point of view, it is not possible to decide whether an act was intentional, negligent or accidental. We have to take into consideration the state of mind as well.

Neither the objective theory nor the subjective theory is correct. Negligence is both subjective and objective. The two theories can be reconciled. They emphasize different aspects of negligence. As contrasted with wrongful intention, negligence is

subjective. As contrasted with inevitable accident, negligence is objective. If the intention is not relevant, the only thing to be considered is whether the doer took the amount of care required by law or not. The answer depends upon external facts which are independent of the state of mind. According to Keeton: "The law takes no heed of man's mind, except in so far as it expresses itself in material acts, and it is only when negligence (considered from the subjective standpoint) has resulted in acts occasioning damage, that the law takes notice of it."

Austin makes a distinction between negligence, heedlessness and rashness. Negligence is the state of mind of the person who inadvertently omits an act and breaks a positive duty. To quote Austin: "The party who is guilty of temerity or rashness, like the party who is guilty of heedlessness, does an act and breaks a positive duty. But the party who is guilty of heedlessness thinks not of the probable mischief. The party who is guilty of rashness thinks of the probable mischief but in consequence of a misapprehension begotten of insufficient advertence, he assumes that the mischief will not ensue in the given instance." In the case of heedlessness, the person concerned does not bother about the possible consequences. In the case of rashness, he knows the consequences but foolishly thinks that they will not occur as a result of his act. In the case of recklessness, he knows the consequences but does not care whether they result from his act or not.

Sir John Salmond does not accept the view of Austin. He points out that there may be advertent or wilful negligence as where a person sees the consequences of his act and in spite of that recklessly does it without intending those consequences. Austin calls it rashness but Salmond calls it negligence. Inadvertence or want of foresight may proceed from ignorance in spite of a genuine and anxious effort to attain knowledge.

In Roman law, there were different degrees of negligence. *Culpa levis in abstracto* was failure to show *exact diligentia* or the care which a *bonus pater familias* would show in that particular transaction. This kind of care was required of a person when a contract was concluded for his benefit or for the mutual benefit



of both parties or when he voluntarily undertook a trust. *Culpa levis concreto* was a failure by a person to take that care which he was accustomed to show in his own affairs. Such a person has to show ordinary diligence. Persons were liable for this kind of negligence where both parties had a common interest. *Culpa lata* or egregious fault was a failure to show any reasonable care at all. It amounted almost to wrongful intention.

The English law does not recognise different degrees of negligence. So far as civil law is concerned, there is only one standard of care and that is of a reasonable and prudent man in the situation actually considered. In criminal law, degrees of negligence are recognised. In *Andrews v. Director of Public Prosecutions*, Lord Atkin observed: "The principle to be observed in cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established. Probably of all epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter." (1937 AC 576 HL).

**Contributory Negligence**:—Contributory negligence is negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. It is the non-exercise by the plaintiff of such ordinary care, diligence and skill as would have avoided the consequences of the negligence of the defendant. The doctrine of contributory negligence "rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by its own carelessness served the casual connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury". The law takes into consideration an act or conduct of the party injured or wronged which may have immediately contributed to that result. One who has by his own negligence

contributed to the injury of which he complains cannot maintain an action against another in respect of it. He is considered to be the author of his own wrong in the eye of law. According to Lord Halsbury, the doctrine of contributory negligence is merely a special application of the maxim that *where both parties are equally to blame, neither can hold the other liable.*

### Measure of Penal Liability

According to Salmond, three elements should be taken into consideration in determining the measure of criminal liability and those are the motive of the offence, the magnitude of the offence and the character of the offender.

(1) As regards *motive of offence*, other things being equal, the greater the temptation to commit the crime, the greater should be the punishment. The object of punishment is to suppress those motives which lead to crimes. The stronger these motives are, the severer must be the punishment in the case. If the profit to be gained from the act is great, the punishment should also be severe proportionately. However, there is an exception to the general rule. Certain offences may be committed on account of urgent necessity or other exceptional circumstances. If a person is forced to steal to feed his starving children, the law generally takes this fact into consideration to lessen the punishment.

(2) Other things being equal, the greater *the magnitude of the offence*, the greater should be its punishment. Such a consideration may seem to be irrelevant. It may be contended that punishment should be measured solely by profit derived by the offender and not by the evils caused to other persons. If two crimes are equal in point of motive, they should be equal in point of punishment. However, this is not the case in actual practice and this is due to two causes. The greater the mischief of any offence, the greater is the punishment which it is profitable to inflict with the hope of preventing it. It is worthwhile to hang any number of murderers in order to deter one murderer and save one innocent person. However, it is not worthwhile to hang one person and stop all petty thefts. Another reason why different punishments are given for different kinds of offences is that such a system induces persons to commit the least serious offences. If punishment for burglary

were to be the same as that for murder, the burglar would not stop at a lesser crime. There will be a temptation to commit offences of a very serious nature as punishment is the same in both cases. If an attempt is punished in the same way as a completed offence, the offender would not stop at the attempt but would like to complete the act as well.

(3) The *character of the offender* should also be taken into consideration while determining the measure of criminal liability. The worse the character or disposition of the offender, the more serious should be the punishment. The fact which indicates depravity of disposition is a circumstance of aggravation. It calls for a penalty in excess of that which would otherwise be appropriate to the offence. The law imposes upon habitual offenders penalties which bear no relation to the magnitude of the offence. A punishment which is suitable to a normal man will be absolutely inadequate in the case of a hardened criminal. Experience shows that the badness of disposition is commonly accompanied by a deficiency of sensibility. If a person is of a depraved character, he loses all sense of shame. The most degraded criminals are said to exhibit insensibility even to physical pain. Many murderers of the worst type show indifference to death itself. In cases short of capital offences, it is desirable to punish more severely the more corrupt.

The Indian Penal Code provides that a previous convict should be awarded an enhanced period of imprisonment. The first offenders are usually let off or treated very leniently. Sometimes the offenders are let off on probation of good conduct on account of their age, character, antecedents or physical or mental condition of the accused and the circumstances in which the offence was committed.

### **Measure of Civil Liability**

In the case of a civil wrong, motive is irrelevant. It is only the magnitude of the offence that determines civil liability. The liability of the offender is not measured by the consequences which he meant to ensue, but by the evil which he succeeded in doing. The liability consists of the compulsory compensation to be given to the injured person and that is to be considered as a

punishment for the offence. In penal redress, compensation in money is given to the injured person and punishment is imposed upon the offender. A rational system of law must combine the advantages of penal redress with a coordinate system of criminal liability. The reason is that penal redress alone is not considered to be sufficient.

### Crime and Tort

It is difficult to draw a clear-cut distinction between a crime and a tort. A tort today may be a crime tomorrow and *vice versa*. However, it is desirable to distinguish between the two terms.

According to Blackstone, torts are private wrongs and involve "infringement of the civil rights which belong to individuals considered merely as individuals". On the other hand, crimes are public wrongs and involve "a violation of the duties due to the whole community". Thus, the distinction between the two lies in the nature of offence. If the offence is serious, it is to be treated as a crime, and if it is not, it is to be treated as a tort.

Austin does not accept the view of Blackstone. He points out that some wrongs are both crimes and torts. For example, an assault or a malicious prosecution may be a tort as well as a crime. All public wrongs are not crimes. It is a public duty to pay tax to the state but a refusal to do so is not a crime. All crimes may not be public wrongs. The theft of a chair is a crime but it cannot be said that the public is affected thereby. The view of Austin is that the distinction between a crime and a tort is purely procedural. If the wrong is a crime, "the sanction is enforced at the discretion of the sovereign". In the case of a tort, "the sanction is enforced at the discretion of the party whose right has been violated". In the case of crime, the machinery of law is set in motion by the State. In the case of a tort, the machinery is set in motion by the individual concerned. In the case of a crime, the State launches the prosecution and it can also withdraw the same. In the case of a tort, a suit for damages is brought by the party concerned. If he gets a decree in his favour, the State cannot interfere and lessen the amount. The State also cannot force a private individual to withdraw the suit filed by him against the wrongdoer.

The view of Salmond is that the views of both Blackstone and Austin are not correct. He points out that criminal proceedings can be started in many cases even by a private individual. A criminal complaint can be filed even by the injured party. The view of Salmond is that the distinction between a crime and a tort is based on the nature of the remedy applied. In the case of a crime, the object of the legal proceedings is the punishment of the offender. However, that object is the payment of damages in the case of tort. The view of Salmond has been accepted by the courts in England, and a reference may be made to the case of *Clifford and O'Sullivan*, (1921) 2 AC 570. In that case, Lord Cave observed: "To be a criminal matter it must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred before some court of judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence."

The distinguishing mark of a crime is that it involves liability to punishment. However, it is contended that the view of Salmond does not contain the whole truth. In criminal cases, the court can and sometimes does order payment of compensation to the injured party. In the case of tort, exemplary damages are sometimes awarded as punishment to the wrongdoer. Prof. Allen maintains that although punishment is a distinguishing mark of crime, it does not explain the nature of crime itself. To quote Allen: "It is not enough to know that crime is punishable wrong, the problem is why it is punishable." Allen is in favour of the view of Blackstone. Crime is a crime because it is wrongdoing and in serious degree threatens the well-being of society.

It is to be observed that there is some truth in all the views mentioned above. A crime has been defined as a breach of public duty, the sanction of which is punishment exigible or remissible at the discretion of the sovereign acting according to law. A tort is defined as a breach of duty affecting private individuals not arising out of trust or contract, the sanction of which is compensation exigible or remissible at the discretion of the party whose right has been infringed.

In *Halsbury's Laws of England*, crime is defined in these words: "A crime is an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to private person, who has a remedy in a civil action, it is an act or default contrary to the order, peace and well-being of society that a crime is punishable by the State."

### *Exemptions from Criminal Liability*

The general rule is that a person is liable for any crime committed by him. However, there are certain exceptions to this general rule. The general rule does not apply in the case of a mistake of fact. If a person does something under a mistake without intending to do which he actually does, he is not criminally liable for his action. A police constable goes to arrest *A* but actually he arrests *B* thinking *B* to be *A*. In this case, the police constable is not guilty of any crime because there was no guilty mind when he arrested *B*. However, it must be noted that the mistake must be reasonable, and there should be no liability for the act actually done under a mistake. In the case of *Tolson*, a woman married another person under a *bona fide* belief that her husband had died in a shipwreck. Later on, it was found that he had actually survived the shipwreck. The woman was prosecuted for bigamy. However, she was acquitted.

Another exception is that a person is not held guilty when he does something under circumstances in which he is absolutely helpless. This is called the principle of *jus necessitatis*. An example was given by Bacon to illustrate this. Two shipwrecked sailors caught hold of a single plank which could carry only one of them. It was under those circumstances that one sailor pushed the other into the sea. The sailor who was saved, was prosecuted. It was held that he was not guilty on account of the circumstances in which he was placed. Likewise, if a person kills another person in self-defence he also does not commit any offence. However, it is to be noted that there are certain limitations on the principle of *jus necessitatis*. In *R v. Dudley*, two shipwrecked sailors ate a boy who was in their company in order to save themselves from starvation. They were prosecuted for murder. They took up the plea of *jus necessitatis*. It was held that the plea of *jus*

*necessitatis* was not available to them. However, as the situation in which they were placed was an abnormal one, a recommendation was made to the Crown for mercy and their punishment was reduced to six months' imprisonment.

Another exception is in the case of infants when children under the age of 8 are exempted from criminal liability. It is presumed that children of tender age have no guilty mind.

Another exception is in the case of inevitable accident which cannot be averted by taking reasonable care. There is no intention because the consequences are not desired in the case of an accident. However, this principle is not absolute. It was held in the case of *Rylands v. Fletcher* that if a person keeps admittedly dangerous property on his premises and harm is caused by its escape, that person is liable for the injury caused. The plea of inevitable accident is not available

### SUGGESTED READINGS

- |                                   |   |
|-----------------------------------|---|
| Allen                             | : <i>Legal Duties.</i>  |
| Barnes and Teeters                | : <i>New Horizons in Criminology.</i>   |
| Bohlen, F.H.                      | : <i>Studies in the Law of Torts</i> , 1926                                   |
| Brett, P.                         | : <i>An Essay on Contemporary Jurisprudence</i> , Butterworths, 1975.         |
| Clark                             | : <i>Analysis of Criminal Liability.</i>                                      |
| Gault, R.H.                       | : <i>Criminology</i>  |
| Glueck, S.                        | : <i>Crime and Justice.</i>   |
| Green, L.                         | : <i>Rationale of Proximate Cause</i> , 1927.                                 |
| Hall, J.                          | : <i>General Principles of Criminal Law</i> , 1960.                           |
| Hall, J.                          | : <i>Theft, Law and Society.</i>  |
| Hart, H.L.A.                      | : <i>Oxford Essays in Jurisprudence</i> , Oxford University Press, 1961.      |
| Hart, H.L.A. and<br>Honore, A. M. | : <i>Causation in the Law</i> , Oxford, 1959.                                 |
| Holland, T. E.                    | : <i>The Elements of Jurisprudence</i> , Oxford, 1924.                        |
| Holmes, O.W.                      | : <i>The Common Law</i> , 1881.   |
| Hooton, E.A.                      | : <i>Crime and the Man.</i>   |
| Keeton, G. W.                     | : <i>The Elementary Principles of Jurisprudence</i> , 1949.                   |
| Keeton, R.E.                      | : <i>Legal Cause in the Law of Torts</i> , Ohio State University Press, 1963. |

- Lawson, F.H. : *Negligence in the Civil Law*, 1950.
- Paton, G.W. : *A Text Book of Jurisprudence*, Clarendon Press, Oxford, 1972.
- Ross, A : *On Guilt, Responsibility and Punishment*, Stevens and Sons Ltd , 1975.
- Ryle, G. : *The Concept of Mind*, Hutchinson's University Library, 1949.
- Salmond, J W. : *Jurisprudence*, Sweet and Maxwell, 1966.
- Salmond, J.W. : *The Law of Torts*, Sweet and Maxwell, 1977.
- Street, H. : *The Foundations of Legal Liability*, New York.
- Street, H. : *The Law of Torts*, Butterworths, 1976.
- Williams, G.L : *Criminal Law*, 1961.
- Winfield, P H. and Jolowicz, J.A : *A Textbook of the Law of Torts*, Sweet and Maxwell (1975).



## XVIII

### LAW OF PROPERTY

#### Meaning of Property

The term property is not a term of art. It has been used in a variety of senses.

(1) In its widest sense, property includes all the legal rights of a person of whatever description. The property of a man is all that is his in law. Such a usage of the term is common in old books although it is becoming out of fashion in modern times. According to Blackstone: "The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior." According to Hobbes: "Of things held in propriety, those that are dearest to man are his own life and limbs; and in the next degree, in most men, those that concern conjugal affection and after them riches and means of living." According to Locke: "Every man has a property in his own person." Every individual has a right to preserve "his property, that is, his wife, liberty and estate".

(2) In a narrower sense, property includes the proprietary rights of a person and not his personal rights. Proprietary rights constitute his estate or property and personal rights constitute his status or personal condition. In this sense, the land, chattels, shares and debts due to a person are his property but not his life or liberty or reputation. This is the most usual sense in which the term is used in modern times but the other uses also have an equal authority.

(3) In another sense, the term property includes only those rights which are both proprietary and real. The law of property is the law of proprietary rights *in rem*. In this sense, a freehold or leasehold estate in land or patent or copyright is property and not a debt or the benefit of a contract.

(4) In the narrowest use of the term, property includes nothing more than corporeal property or the right of ownership in material things. According to Ahrens, property is "a material object subject to the immediate power of a person".

(5) According to Austin, the term property is sometimes used to denote the greatest right of enjoyment known to the law excluding servitudes. Sometimes, life interests are described as property. Even servitudes are described as property in the sense that there is a legal title to them. Sometimes, property means the whole of the assets of a man including both the rights *in rem* and rights *in personam*.

In modern times, intellectual or intangible property has become very important. Instances of such property are copyrights, trade marks, property in designs and patents. According to Erle J. : "The notion that nothing is property which cannot be earmarked and recovered in detenu or trover, may be true in an early stage of society when property is in its simplest form and the remedies for the violation of it are also simple, but it is not true in a more civilized state when the relations of life and the interests arising therefrom are complicated."

### Kinds of Property

Property is essentially of two kinds : corporeal and incorporeal. Corporeal property can be further divided into movable and immovable property and real and personal property. Incorporeal property is of two kinds : rights *in re propria* and rights *in re aliena* or encumbrances.

#### *Corporeal Property*

Corporeal property is also called tangible property because it has a tangible existence in the world. It relates to material things. The right of ownership of a material thing is the general, permanent and inheritable right of user of the thing. Ownership of land and chattel consists in the sum-total of the rights of user.

(a) Corporeal property is of two kinds, *movable* and *immovable*. Land is immovable property and chattels are movable property.

According to Salmond, an immovable piece of land has many elements. It is a determinate portion of the surface of the earth. It includes the ground beneath the surface down to the centre of the world. It also includes the column of space above the surface *ad infinitum*. According to Coke: "The earth hath in law a great extent upwards, not only of water as hath been said but of air and all other things even up to heaven." According to the German Civil Code, the owner of land owns the space above it. He has no right to prohibit acts so remote from the surface that they do not affect his interests in any way. The right of free and harmless passage at a reasonable height over land is secured and governed by the Air Navigation Act, 1920. It also includes objects which are on or under the surface in its natural state, e.g., minerals and natural vegetation. All these are a part of the land although they are not physically attached to it. Land also includes all objects placed by human agency on or under the surface with the intention of permanent annexation. Examples are buildings, doors, fences etc.

According to the General Clauses Act of 1897: "Immovable property includes land, benefits arising out of land and things attached to the earth or permanently fastened to anything attached to the earth." According to the Indian Registration Act: "Immovable property includes land, building, hereditary allowance, rights of way, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth but not standing timber, growing crops or grass." The Indian Transfer of Property Act excludes standing timber, growing crops and grass from the definition of immovable property.

Movable property includes all corporeal property which is not immovable.

(b) *Real and Personal Property*: The distinction between real and personal property is closely connected with but not identical with the distinction between movable and immovable property. The connection is, however, historical and not logical. Real property means all rights over land recognized by law. Personal property means all other proprietary rights whether they are rights *in rem* or rights *in personam*. According to Salmond: "Real pro-

perty and immovable property form intersecting circles which are very nearly though not quite coincident. The law of real property is almost equivalent to the law of land, while the law of personal property is all but identical with the law of movables. The partial failure of coincidence is due not to any logical distinction but to the accidental course of legal development; and to this extent the distinction between real and personal property is purely arbitrary and possesses no scientific basis. Real property comprises of rights over land, with such advantages and exceptions as the law has seen fit to establish. All other proprietary rights, whether *in rem* or *in personam*, pertain to the law of personal property."

### *Incorporeal Property*

Incorporeal property is intangible property. It is also called intellectual or conventional property. It includes all those valuable interests which are protected by law. The recognition and protection of incorporeal property has been secured in recent times. Formerly, property in the form of land alone was considered to be all important. In modern times a lot of property of the country is to be found in the form of the shares of limited companies. Millions of persons in every country possess such property.

(a) *Rights in re propria*: Incorporeal property is of two kinds *viz*, rights *in re propria* and rights *in re aliena*. Rights *in re propria* are those rights of ownership in one's own property as are not exercised over material objects. Generally, the law of property deals with material objects. However, in some cases, ownership of some non-material things produced by human skill and labour is recognized as property. The most important of such rights are patents, literary copyright, artistic copyright, musical and dramatic copyright, commercial goodwill, trade marks and trade names.

(i) The subject-matter of a patent is the new idea or particular process of manufacture produced or discovered by human skill and labour. Patents become commercially valuable as a monopoly of exploitation is given to the patentee.

Law takes action against those who infringe in any way the patents.

(ii) Literary copyright is possessed by the author of books. No person is allowed to print it and if he does so, he is liable to be punished. Literary copyright is a great boon to the writers of the world. It is this right which enables them to earn their livelihood and also make provision for their successor. The copyright exists not only during the lifetime of the author and the co-author, but even after their death.

(iii) In the case of artistic copyright, the subject-matters are the particular designs or forms. The artist alone has the exclusive use of design or form. Such a copyright exists in the case of drawing, painting, photography, etc.

(iv) Musical and dramatic copyright consists in musical and dramatic works. The composer, musician and the dramatist have the exclusive right to the use of their things. Any unauthorised performance or representation is liable to be punished with imprisonment or fine or both.

(v) The goodwill of a company is a valuable right acquired by a person by his labour and skill exercised for a considerable period. Very often, the sale of goodwill brings a lot of money to its owner.

(vi) Trade names and trade marks are also the property of persons who own them. They protect the public from cheaters. They guarantee a particular quality of goods.

(vii) Holland adds a new type of intangible property to the list. To quote him: "With such intangible property should probably also be classified those royal privileges subsisting in the hands of a subject which are known in English law as franchises, such as right to have a fair or market, a forest, free warren or free fishery."

(b) *Rights in re aliena*:—Rights in *re aliena* are known by the name of encumbrances. They are rights in *rem* over a *res* owned by another. Such rights run with the *res* encumbered. They bind the *res* in whosoever hands it may pass. Encumbrances are the

rights of particular user as distinguished from ownership which is right of general user. Encumbrances prevent the owner from exercising some definite rights with regard to his property. The main kinds of encumbrances are leases, servitudes, securities and trusts.

(i) *Leases*:—A lease is an encumbrance giving a right to the possession and use of the property of another person. It is the transfer of a right to enjoy certain property. It is either for a certain period or in perpetuity. It is an agreement by which the owner of the property or the lessor transfers his right of possession to the lessee. It is not an absolute transfer of all rights in the property. It is merely a partial transfer. What is transferred is merely the right of possession and the use of property. It separates ownership from property.

Ordinarily, a lease is with respect to land. However, every right that can be possessed can be made the subject of a lease. Thus there can be the lease of copyright, a patent, right of way, right to receive interest on government promissory notes, etc.

(ii) *Servitudes*:—A servitude is “that form of encumbrance which consists in a right to the limited use of a piece of land without possession of it”. According to Paton, the holder of a servitude has a right *in rem* which gives him the power either to put a *res* belonging to another to a certain class of definitely limited uses or else to prevent the owner of the *res* from putting it to a certain class of definitely determined uses. There is no possession in a case of a servitude and this distinguishes it from a lease. If I secure exclusive possession of a piece of land without getting its ownership, I acquire a lease. If I acquire the right to use that land in some definite way without getting either its ownership or possession, I acquire only a servitude. Generally, servitudes exist with respect to land only. Examples of servitudes are the right of way across the land of somebody, the right of light and air, the right of view of prospect, the right of the public to pass across a land, right of pasturage, right of recreation on a piece of land, right of fishing, public right of navigation etc.

*Kinds of servitudes*:—Servitudes have been classified in many ways. Some classify them as praedial and personal and positive and negative. A *praedial* or *real* or *appurtenant servitude* is that which is enjoyed by the owner for the time being of land or a house over another piece of land. The land at the house is called the dominant tenement and other piece of land is called the servient tenement. Such a servitude is a right of using one property for the benefit of another property. It is necessary to the dominant property. The servitude passes with the transfer of the dominant tenement. That is why it is called “appurtenant to the dominant tenement”. A real servitude cannot be separated from the dominant tenement. Examples of such servitudes are the right of way, right of support of a building by the adjoining soil, right of access of light from the windows, etc.

A *personal servitude* is one which is vested in an individual because of his personality. Such a right is not attached to any particular tenement. An example of such a servitude is the right of fishing by one person in the pond of another person.

A *positive servitude* is one which entitles the owner to do something. An example of such servitude is the right to walk across the land of another person. A negative servitude entitles the owner to prevent the servient owner from doing something. The servient owner can be prevented from building his house higher than that of the dominant owner. He can be prevented from obstructing the view, prospect, light or air which is enjoyed by the dominant owner. A positive servitude entitles the owner to do something and the *negative servitude* entitles him to prevent another from doing something. A positive servitude can be lost by non-user but that cannot be the case with a negative servitude. The latter can be lost only if the servient owner infringes the servitude and the dominant owner submits to the same.

Sir John Salmond classifies servitudes as appurtenant and in gross, and public and private. Appurtenant servitudes are enjoyed by the owner for the time being of land or a house over other piece of land. *Servitudes in gross* are those which are not appurtenant or accessory to any particular land or building. Examples of such servitudes are the public right of navigation or fishing,

public right of way or the right of pasturage. *Private servitudes* are possessed by certain individuals and *public servitudes* vest in the public at large. Examples of private servitudes are the right to light, the right of way, the right of fishing, etc., possessed by one individual. Examples of public servitudes are the right of the public to pass through a particular field or a house.

Reference may be made to what are called *easements*. In a sense, an easement is the same thing as a servitude. However, servitudes can be divided into easements and *profits a prendre*. Easements include only the private and appurtenant servitudes. An example of an easement is the right of way. *Profits a prendre* includes only the right to derive certain profits from the servient tenement. An example of such a servitude is the right to graze cattle or the right to fish in a pond.

(iii) *Securities*:—According to Lord Wrenbury: "A security is a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after whose satisfaction the balance of the property or fund belongs to the grantor. There are two owners and the right of the one has precedence over the right of the other." According to Salmond: "A security is a *jus in re aliena*, the purpose of which is to ensure or facilitate the fulfilment or enjoyment of some other right (usually though not necessarily a debt) vested in the same person" *A security differs from a surety*. In the case of security, a particular *res* is charged with the debt. In the case of surety, the surety is under an obligation to pay the debt of another if the latter fails to pay the debt of another.

*Mortgage and Lien*:—According to Salmond, securities are of two kinds: *mortgages* and *liens*. A *mortgage* is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of loan. A *lien* is the right to hold the property of another person as a security for the performance of an obligation. In the case of a mortgage, the ownership is transferred to the mortgagee, but in the case of lien it remains with the owner. In the case of a mortgage, the mortgagor has the equity of redemption. He can get back the property by paying



back the money. Both the mortgagor and the mortgagee possess limited rights in the property. In the case of lien, ownership remains with the debtor but the creditor is given possession of the thing and he is allowed to keep the same till his claim is satisfied. A lien is a security and an accessory right but a mortgage is an independent or principal right. The right of lien vests absolutely in the lienee. The right of mortgage is more than a security and vests conditionally and not absolutely. As a lien is attached to the debt, it automatically comes to an end on the extinction of the debt. A mortgage is an independent right and can survive even after the extinction of the debt. There is no transfer of a right in the case of a lien but there is a transfer of a right in the case of a mortgage. Any valuable transferable right can be mortgaged. A lien is created by way of encumbrance only but a mortgage is created either by transfer or by encumbrance. In the case of a lien, the debtor has the full legal and equitable ownership. The creditor has only rights and powers like sale, possession etc., which can safeguard his interest. Where a mortgage is created by the transfer of the right of the debtor to the creditor, the debtor is the beneficial or equitable owner. On the payment of the debt, the mortgagee becomes a mere trustee.

*Kinds of Liens*—Liens are of many kinds: possessory lien, right of distress or seizure, power of sale, power of forfeiture and charge. A possessory lien consists in the right to retain possession of chattels or other property of the debtor. The right of distress or seizure consists in the right to take possession of the property of the debtor, with or without a power of sale. Power of sale is a form of security which is seldom found in isolation but is usually incidental to the right of possession conferred by one or other of the two preceding forms of lien. In the case of power of forfeiture, a power is vested in the creditor to forfeit the right encumbered. Examples of such a lien are the right of re-entry of landlord, the power of the vendor to forfeit earnest money paid by a prospective purchaser, etc. A charge consists in the right of a creditor to receive payment out of some specific fund or out of the proceeds of specific property.

(iv) *Trust*:—A trust is an obligation annexed to the ownership of property. It arises out of a confidence reposed in and accepted

by the owner or declared and accepted by him for the benefit of another, or of another and the owner. The persons for whose interest trusts are created are infants, lunatics, unborn persons, etc. According to Paton: "The trust has served in many fields. Firstly, it has been used by associations as a means whereby the group property can be applied to the desired purposes. Secondly, the problem of endowments and of gifts for charitable and religious purposes is made easy, for the property may be vested in trustees for such purposes as the settler desires. Thirdly, the trust has been of great social importance in making possible a facile settlement of family property; the young have been protected from their inexperience, a married woman, through the help of equity, secured a certain measure of economic independence in spite of the common law rule which then vested her chattels in her husband."

### Modes of Acquisition of Property

Salmond refers to four modes of acquisition of property and those are possession, prescription, agreement and inheritance.

(1) As regards *possession*, it is the objective realization of ownership. The possession of a material object is a title to its ownership. The *de facto* relation between person and thing brings the *de jure* relation along with it. He who claims a piece of land as his own and has also the possession of the same, makes it good in law also by way of ownership. If a person is in possession of a thing, he cannot be ousted except by one who is the true owner. Even the true owner cannot do so forcibly. He has also to seek the help of law to vindicate his own right. According to Salmond, a thing owned by one person and adversely possessed by another has two owners and those are the absolute owner and the possessory owner. If a possessory owner is deprived of its possession by a person who is other than the true owner, he has the right to recover possession of the same. If property belongs to nobody, the person who captures it and possesses it has a good title against the whole world. In this way, the birds of the air and the fish of the sea are the property of that person who first catches them.

(2) According to Salmond: "*Prescription* may be defined as the effect of lapse of time creating and destroying rights; it is the

operation of time as a vestitive fact." Prescriptions are of two kinds, positive or acquisitive prescription and negative or extinctive prescription. Positive prescription means the creation of a right by the lapse of time. Negative prescription is the destruction of a right by the lapse of time. Lapse of time has two opposite effects. In the case of positive prescription, it is a title of right. In the case of negative prescription, it is a divestitive fact. Long possession creates rights and long want of possession destroys them. If I possess an easement for 20 years without owning it, I begin at the end of that period to own and possess it. Likewise if I own land for 12 years without possessing it, I cease on the termination of that period either to own or to possess it. The two forms of prescription may coincide so that what one man loses another man gains.

According to Salmond: "The rational basis of prescription is to be found in the presumption of coincidence of possession and ownership, of fact and of right. Owners are usually possessors and possessors are usually owners. Fact and right are normally coincident; therefore, the former is evidence of the latter. That a thing is possessed *de facto* is evidence that it is owned *de jure*. That it is not possessed raises a presumption that it is not owned either. Want of possession is evidence of want of title. The longer the possession or want of possession has continued, the greater is its evidential value." Again, "the tooth of time may eat away all other proofs of title. Documents are lost, memory fails, witnesses die. But as these become of no avail, an efficient substitute is in the same measure provided by the probative force of long possession. So also with long want of possession as evidence of want of title; as the years pass, the evidence in favour of the title fades, while the presumption against it grows ever stronger."

Prescription is not limited to rights *in rem*. It is found within the sphere of obligations and of property. Positive prescription is possible only in the case of rights which admit of possession. Most rights of this nature are rights *in rem*. Rights *in personam* are commonly extinguished by their exercise and cannot be possessed or acquired by prescription. Negative prescription is common to the law of property and obligations. Most obligations are destroyed by the lapse of time. Their ownership cannot be accom-

panied by their possession. There is nothing to save them from the destructive influence of delay in their enforcement.

Negative prescription may be perfect or imperfect. Perfect prescription is the destruction of the principal right itself. Imperfect prescription is merely the destruction of the accessory right of action. The principal right continues to remain in existence. An example of a perfect prescription is the destruction of ownership of land through dispossession for 12 years. An example of an imperfect prescription is in the case of an owner of chattel who has been out of possession of it for six years. He loses his right or action for its recovery although he continues to be its owner. If the period of limitation passes, the creditor cannot seek the help of law to recover the debt

(3) Another method of acquiring property is by means of an *agreement*. According to Paton, an agreement is the expression by two or more persons communicated each to the other of a common intention to affect the legal relations between them. An agreement is the result of a bilateral act. It may be in the nature of assignment or a grant. An assignment transfers existing rights from one owner to another. A grant connotes the assurance or transfer of the ownership of property as distinguished from the delivery or transfer of property itself. Agreements are either formal or informal. There are some agreements which require registration and attestation of the deed. There are others which are verbal and informal. In the case of Rome, an alienation *inter vivos* (during lifetime) required not only the agreement of the parties but also the delivery of possession.

There is a general rule that *the title of the transferee by agreement cannot be better than that of the transferor*. This is due to the fact that no man can transfer a better title than what he himself possesses. However, there are *two exceptions* to this general rule. The transferee gets a good title from a trustee who fraudulently sells the trust property, provided the transferee purchases it for value and without notice of the equitable claim of the beneficiary. The second exception is where the possession of a thing is in one man and the ownership of it is in another, the possessor can transfer in certain cases a better title on the assumption that the possessor

is the owner, provided the transferee obtains it in good faith believing him to be the owner. The possessor of a negotiable instrument may have no title to it but he can give a good title to anyone who takes it from him for value and in good faith. Likewise, mercantile agents in possession of the goods can transfer good title, whether they are authorised to sell them or not.

(4) Another method of acquiring property is by means of *inheritance*. When a person dies, certain rights survive him and pass on to his heirs and successors. There are others which die with him. Those rights which survive him are called heritable or inheritable rights. Those rights which do not survive him are called uninheritable rights. Proprietary rights are inheritable as they possess value. Personal rights are not inheritable as they constitute merely his status. However, there are certain exceptions to the general rule. Personal rights may not die in the case of hereditary titles. Proprietary rights may be uninheritable in the case of a lease for the life of the lessee only or in the case of joint ownership.

Succession to the property of a person may be either testate or intestate. It may be by means of a will or without a will. If there is a will, succession takes place according to the terms of the will. If there is no will, succession takes place by the operation of law. If there are no heirs at all, the property goes to the State.

There are three limitations on the power of a person to dispose of his property by means of a will. Those are the limitation of time, limitation of amount and the limitation of purpose.

As regards the limitation of time, a will that controls the devolution of the estate in property is void. According to the Indian law, property cannot be tied up longer for a life in being and 18 years after. The testator must so order the destination of his property that within a certain period the whole of it becomes vested absolutely in some one or more persons, free from all testamentary conditions and restrictions. As regards the limitation of amount, a testator can deal only with a certain portion of his estate and the rest of it has to be allotted by law to the members of his family. According to Mohammedan law, no

Muslim can bequeath more than one-third of the surplus of his estate after providing for his funeral expenses and payment of debt unless the heirs consent to the same. In the case of Hindu law, the testator can dispose of only his self-acquired property and not the ancestral property. As regards the limitation of purpose, the testator cannot dispose of his property in a way which is against the interests of humanity. He cannot will that his property shall lie waste. He cannot will that all his money will be buried along with his dead body. He cannot will that all his money should be deposited in the seabed.

### Theories of Property

According to Hobson: "From the earliest times, the existence and sense of property, the exclusive acquisition and use of material objects that are scarce and desirable, have been important factors in the life of man. Such ownership or property has been desired and striven for, partly for pleasurable consumption, partly as a means to further acquisition of consumable goods, but also for power over human beings and for the prestige that attaches to ownership and power." Many theories have been put forward to explain the origin of property and its justification.

(1) According to the *natural law theory*, property is based on the principle of natural reason derived from the nature of things. Property was acquired by occupation of an ownerless object and as a result of individual labour. Grotius, Pufendorf, Locke and Blackstone are the great supporters of the theory. According to Grotius, all things originally were without an owner and whosoever captured them or occupied them, became their owners. According to Pufendorf, originally, all things belonged to the people as a whole. There was no individual ownership. By means of an agreement or a pact, private ownership was established. According to Blackstone: "By the law of nature and reason, he who first began to use a thing acquired therein a kind of transient property that lasted so long as he was using it and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. But when mankind increased in number, craft and

ambition, it became necessary to entertain conceptions of more permanent dominion and to appropriate to individuals, not the immediate use only but the very substance of the thing to be used. The theory of occupancy is the ground and foundation of all property or of holding those things in severalty which by the law of nature, unqualified by that of society, were common to all mankind."

(2) The *metaphysical theory* was propounded by writers like Kant and Hegel. According to Kant: "A thing is rightfully mine when I am so connected with it that anyone who uses it without my consent does me an injury. But to justify the law of property, we must go beyond cases of possession where there is an actual physical relation to the object and interference therewith is an aggression upon personality." According to Hegel, property is the objective manifestation of the personality of an individual. To quote him: "Property makes objective my personal individual will." Property is the object on which a person has the liberty to direct his will.

(3) According to the *historical theory*, private property had a slow and steady growth. It has grown out of collective group or joint property. There were many stages in the growth of individual property. The first stage was that of natural possession which existed independently of the law or the State. The second stage was the juristic possession. Juristic possession was a conception both of fact and law. The last stage of development was that of ownership. It is purely a legal conception having its origin in law. The owner is guaranteed by law the exclusive control and enjoyment of the thing owned by him. According to Sir Henry Maine: "Private property in the shape in which we know it was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community." Again, "for many years past, there has been sufficient evidence to warrant the assertion that the oldest discoverable forms of property in land were forms of collective property and to justify the conjecture that private property had grown through a series of changes, out of collective property or ownership in common." Again, "property originally belonged not to individuals, not even to isolated

families, but to larger societies composed on the patriarchal mode." It was later on that family property disintegrated and individual rights of property came into existence. According to Dean Roscoe Pound, the earliest form of property was group property. It was later on that families were partitioned and individual property came into existence. Similar views are held by Miraglia, the Italian jurist

(4) Spencer was the propounder of the *positive theory*. He based his theory on the fundamental law of equal freedom. Property is the result of individual labour. No man has a moral right to property which he has not acquired by his personal effort.

(5) According to the *psychological theory*, property came into existence on account of the acquisitive instinct of man. Every individual desires to own things and that brings into existence property. According to Bentham: "Property is nothing more than the basis of a certain expectation of deriving hereafter certain advantages by a thing by reason of the relation in which we stand towards it. There is no image, no visible lineament which can portray the relation that constitutes property. It belongs not to physics but to metaphysics. It is altogether a conception of mind." Again, "to hold the object in one's hand, to keep it, to manufacture it, to work it up into something else, to make use of it, all or any of these physical circumstances failed to assist in conveying the idea of property. A piece of cloth actually in the Indies may belong to me, but the coat which I have too may not belong to me. The very food which has mingled with my body may be property of another to whom I must account for the price. The conception of property consists in a fixed and settled expectation; in the pursuance of my capacity to derive from the object, hereafter, certain advantages of a character dependent upon the nature of the case". According to Dean Pound: "Moreover, whatever we do, we must take account of the instinct of acquisitiveness and of individual claims grounded thereon."

(6) According to the *sociological theory*, property should not be considered in terms of private rights but should be considered in



terms of social functions. Property is an institution which secures a maximum of interests and satisfies the maximum of wants. According to Jenks: "The unrestricted right to use, neglect or misuse his property can no longer be granted to any individual and the rights of property should be made conformable to rules of equity and reason." According to Laski: "Property is a social fact like any other and it is the character of social facts to alter. It has assumed the most varied aspects and it is capable of yet further changes."

(7) "Property and law were born together and would die together. Before the laws, property did not exist; take away the laws and property will be no more. That which in a state of nature is no more than a thread becomes, when society is constituted, veritable cable." According to Rousseau: "It was to convert possession into property and usurpation into a right that law and State were founded. The first man who enclosed a piece of land and said? 'This is mine', was a real founder of civil society." Again, "the law of property is the systematic expression of the degree and forms of control, use and enjoyment of things by persons that are recognised and protected by law." Thus, property was the creation of the State.

### SUGGESTED READINGS

- Austin : *Jurisprudence.*  
 Bhalla, R. S. : *The Institution of Property—Legally, Historically and Philosophically Regarded.*  
 Cheshire : *The Modern Law of Real Property.*  
 Lafargue : *Evolution of Property.*  
 Letourmeau : *Property, its Origin and Development.*  
 Noyes, C. R. : *Institution of Property.*  
 Pound, R. : *Philosophy of Law.*  
 Rashdell : *Property, its Duties and Rights.*  
 Vinogradoff : *Historical Jurisprudence.*  
 Weises, F. : *Trust on the Continent of Europe.*

## XIX

# THE LAW OF OBLIGATIONS

### Definition of Obligation

According to Sir John Salmond: "An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right." Obligations are merely one class of duties, namely, those which are the correlatives of rights *in personam*. An obligation is the *vinculum juris*, or bond of legal necessity, which binds together two or more determinate individuals. It includes the duty to pay a debt, to perform a contract, or to pay damages for a tort, but not the duty to refrain from interference with the person, property or reputation of others. The term obligation is the name not only of a duty but also of a correlative right. Looked at from the point of view of the person entitled, an obligation is a right. Looked at from the point of view of the person bound, it is a duty. Moreover, all obligations pertain to the sphere of proprietary rights. They form a part of the estate of the person who is entitled to them.

According to Paton, an obligation is that part of the law which creates rights *in personam*. According to Kant, an obligation is "the possession of the will of another as a means of determining it through my own, in accordance with the law of freedom, to a definite act". According to Savigny, an obligation is "the control over another person, yet not over this person in all respects (in which case his personality would be desired), but over single acts of his which must be conceived of subtracted from his free will and subjected to our will".

According to Holland. "An obligation, as its etymology denotes, is a tie whereby one person is bound to perform some act for the benefit of another. In some cases, the two parties agree thus to be bound together; in other cases, they are bound with-

out their consent. In every case, it is the law that ties the knot and its untying, *solutio*, is competent only to the same authority."

### *Chose in Action*

A technical synonym for an obligation is a chose in action or a thing in action. A chose in action means a proprietary right *in personam*. An example of a chose in action is a debt or a claim for damages for a tort.

### *Chose in Possession*

Choses in action are opposed to choses in possession. In its origin, a chose in possession was anything or right which was accompanied by possession and a chose in action was anything or right of which the claimant has no possession but which he must obtain, if need be, by way of an action at law. Money in the purse of a person is a thing in his possession. Money which is due to a creditor by a debtor is a thing in action.

According to Dias and Hughes: "Choses in action have been defined as all 'personal rights of property which can only be claimed or enforced by action and not by taking physical 'possession', in short, they are rights *in personam* which are 'proprietary'. Choses in possession mean things capable of physical possession and delivery, *i.e.*, tangible objects." (p. 221, *Jurisprudence*).

### **Solidary Obligations**

The normal type of obligation is that in which there is one creditor and one debtor. However, it often happens that there are two or more creditors entitled to the same obligation, or two or more debtors under the same liability. The case of two or more creditors does not require special consideration. However, the case of two or more debtors calls for special notice.

Examples of solidary obligations are debts owing by a firm of partners, debts owing by a principal debtor and guaranteed by one or more sureties and the liability of two or more persons who together commit a tort. In all these cases, each debtor is liable for the whole amount due. The creditor is not obliged to divide his claim into as many different parts as there are debtors. He may exact the whole sum from one and leave him to recover from

his co-debtors, if possible and permissible, a just proportion of the amount so paid. A debt of Rs. 1000 owing by two partners, *X* and *Y*, is not equivalent to one debt of Rs. 500 owing by *X* and Rs. 500 owing by *Y*. It is a single debt of Rs. 1000 owing by each of them, in such fashion that each of them may be compelled to pay the whole of it, but when it is once paid by either of them, both of them are discharged from the debt.

Obligations of this description may be called solidary since each of the debtors is bound in *solidum* instead of *pro parte*, which means for the whole and not for a proportionate part. According to Salmond, a *solidary obligation may be defined as one in which two or more debtors owe the same thing to the same creditor*.

### *Three Kinds of Solidary Obligations*

In English law, solidary obligations are of three distinct kinds. They are several, joint and joint and several.

(1) Solidary obligations are *several* when, although the thing owed is the same in each case, there are as many distinct obligations and causes of action as there are debtors. Each debtor is bound to the creditor by a distinct and independent *vinculum juris*, the only connection between them being that in each case the subject-matter of the obligation is the same with the result that performance by one of the debtors discharges all others.

(2) Solidary obligations are *joint* when though there are two or more debtors, there is only one debt or other cause of action, as well as only one thing owed. The *vinculum juris* is single, though it binds several debtors to the same creditor. The chief effect of this unity of the obligation is that all the debtors are discharged by anything which discharges any one of them. When the *vinculum juris* has once been severed as to any of them, it is severed as to all.

(3) Certain solidary obligations are both *joint and several*. They stand halfway between several and joint obligations. They are the product of a compromise between two competing principles. For some purposes, the law treats them as joint and for other purposes as several. For some purposes, there is in the eye

of law only one single obligation and cause of action, while for other purposes the law consents to recognise as many distinct obligations and causes of action as there are debtors.

Under Section 43 of the Indian Contract Act, the liability is joint and several unless there is an agreement to the contrary. The result is that if a promise is made by *A*, *B* and *C* to *X*, *X* may sue, at his option, *A* only, or *B* only, or *C* only, or any two or all three of them. In case the entire promise is performed by, say, *A* alone, he can claim to be reimbursed by *B* and *C* for their proportionate shares.

When *A* has received a loan from *C* under a promissory note executed by him on a particular date and at a subsequent date *B* guarantees the same debt of *A* by executing a surety bond, the liability of both *A* and *B* is several. If *A* and *B* execute the same bond on the same date and *A* receives the loan, *B* being only a surety, the liability is one of joint solidary obligation. The obligation of partners in a firm is a joint solidary obligation. The liability of independent wrongdoers causing the same damage is several solidary obligation. Separate judgments obtained in distinct actions against two or more persons for the same debt are instances of several solidary obligations. Two persons jointly and severally liable on the same contract may be separately sued and judgment may be obtained against each of them. They are no longer jointly liable, but severally liable for the same obligation.

The question arises as to how it is to be determined as to which of the three solidary obligations a case belongs. According to Salmond, generally, such obligations are several when, although they have the same subject-matter, they have different sources. They are several in their nature if they are distinct in their origin. They are joint when they have not merely the same subject-matter, but the same source. Joint and several obligations are those joint obligations which the law, for several reasons, chooses to treat in special respects as if they were several. Like those which are purely and simply joint, they have the same source as well as the same subject-matter, but the law does not regard them consistently as comprising a single *vinculum juris*.

The following are examples of solidary obligations which are several in their nature :

- (1) The liability of a principal debtor and that of his surety provided the contract of suretyship is subsequent to, or otherwise independent of, the creation of the debt so guaranteed. If the two debts have the same origin, the case is one of joint obligation.
- (2) The liability of two or more co-sureties who guarantee the same debt independently of each other. They may make themselves joint, or joint and several debtors by joining in a single contract of guarantee
- (3) Separate judgments obtained in distinct actions against two or more persons liable for the same debt. Two persons, jointly and severally liable on the same contract may be separately sued and judgments may be obtained against each of them. In such a case, they are no longer jointly liable at all and each is severally liable for the amount of his own judgment. These two obligations are solidary as the satisfaction of one will discharge the other.
- (4) The liability of independent wrongdoers whose acts cause the same damage. This is a somewhat rare case but is perfectly possible. Two persons are not joint wrongdoers simply because they both act wrongfully and their acts unite to cause a single mischievous result. They must have committed a joint act. They must have acted with some common purpose. If not, they may be liable in *solidum* and severally for the common harm to which their separate acts contribute; but they are not liable as joint wrongdoers. The house of the plaintiff was injured by the subsidence of its foundations which resulted from excavations negligently made by A, taken in conjunction with the negligence of B, a water company, in leaving a water-main insufficiently stopped. It was held that inasmuch as their acts were quite independent of each other, A and B were not joint wrongdoers and could

not be joined in the same action. The liability of the parties was solidary, but not joint. So also the successive acts of wrongful conversion may be committed by two or more persons in respect of the same chattel. Each is liable in the action of trover to the owner of the chattel for its full value, but they are liable severally and not jointly. The owner may sue each of them in different actions, though payment of the value by any one of them will discharge the others.

Examples of joint obligation are debts of partners and all other solidary obligations which have not been expressly made joint and several by the agreement of the parties. Examples of joint and several obligations are the liabilities of those who commit a tort or perhaps a breach of trust and also all contractual obligations which are expressly made joint and several by the agreement of the parties.

### Sources of Obligations (Kinds of Obligations)

If we classify obligations from the point of view of sources, we have four such kinds of obligations, *viz*, contractual obligations, delictal obligations, *quasi*-contractual obligations and innominate obligations

(1) *Obligations arising from contracts*: Contractual obligations are those which are created by contracts or agreements. These obligations create rights in *personam* between the parties. The rights so created are generally proprietary rights. Sometimes, a contract creates rights which are not proprietary though they are *in personam*. An example of such an obligation is a promise of marriage. At the beginning, the idea of an obligation was strictly personal. Under the common law, choses in action were not assignable. Later on, negotiable instruments came to be assigned. The Judicature Act of 1873 made all debts and legal choses in action assignable at law. There are still certain rights which cannot be transferred and those are the assignment of a mere right to sue for damages in tort or a right to personal services without the consent of the person bound.

(2) *Obligations arising from torts*: *Delictal obligations* arise from torts. According to Salmond: "A tort may be defined as a civil wrong for which the remedy is an action for damages and which is not solely the breach of contract or the breach of trust or other merely equitable obligations." Delictal obligations are those in which a sum of money is to be paid as compensation for a tort. A tort has a penal element and a remedial element and the same act may be a crime and a tort. However, *a tort is distinguishable from crimes and civil wrongs* in certain respects. A tort is a civil wrong as distinguished from a crime and the sanction is remissible by the injured person. A tort is a special kind of civil wrong and the proper remedy for it is damages and not civil remedies like injunction, specific performance, restitution of property, payment of a liquidated sum of money by way of penalty or otherwise, etc. No civil wrong is a tort if it is exclusively breach of contract. The *liability for a breach of contract* and *liability for torts* are governed by different principles. However, the same act may be both a tort and a breach of contract. This happens in two cases. In the first case, a man may undertake by contract the performance of a duty which lies in him already, independently of any contract. He who refuses to return a borrowed chattel commits a breach of contract and also a tort. In the second case, a liability in tort arises out of a breach of contract in favour of one who is not a party to the contract. *X* lends some chattel to *Y* who hands them over to *Z* for safekeeping. *Z* agrees to do so. The chattel is destroyed. *Z* is liable for the breach of contract to *Y* and in tort to *X*. A tort differs in origin from the breach of trust or other equitable obligations as the former was recognized by common law and the latter only by the Chancery. Even now the distinction is maintained as the principles are not the same in both cases.

A distinction may be made between a *contractual obligation* and a *delictal obligation* or tort. A contract is based on consent but a tort is inflicted against or without consent. Privity between the parties is implied in a contract but that is not so in the case of a tort. In a contract, the right or duty arises from an agreement between the parties. The duty in a contract cannot be enforced by a third party but only by the parties to the contract. In the



case of tort, there is a breach of general law and consequently anybody suffering from the acts of another can file a suit. A breach of a contract is a violation of a right *in personam*. A tort is mostly a violation of a right *in rem*. There is no place for motive in a breach of contract but motive is taken into consideration in a tort. If there is a breach of contract, damages are in the nature of compensation. In the case of a tort, damages may be exemplary or vindictive in the case of malice or fraud. The measure of damages can be fixed according to the terms of the contract between the parties but in the case of tort, it is not possible to fix the damages with precision. Originally, a tort was recognised in common law but a breach of contract was recognised only by the Court of Chancery.

(3) *Obligations arising from quasi-contracts*: Quasi-contractual obligations (obligations *quasi ex contractu*) are such as are regarded by law as contractual though they are not so in fact. These obligations are called by Salmond by the name of "*contracts implied in law*". There are cases in which law departs from the actual facts and implies a contract by *fiction*. A quasi-contractual obligation is something the effect of which resembles the effect of a contract. However, it is to be observed that all implied contracts are not quasi-contracts. An implied contract may be either "*implied in law*" or "*implied in fact*". Although the former is not a true contract, law regards the obligation as if it were in the nature of a contract. The latter is a true contract and is based on the agreement between the parties. A quasi-contractual obligation arises where the law fictitiously attaches a contract. A money decree creates an obligation which is not contractual. There is no agreement to pay. However, the law presumes that there is a duty to pay and also promise to pay. This is a quasi-contractual obligation. If I enter a train, it implies that I agree to pay the railway fare. My obligation is truly a contractual one.

Most of the quasi-contractual obligations fall under two heads. All debts are deemed in theory of common law to be contractual in origin although they may not be so in actual fact. Examples are a judgment debt, money got by fraud or paid under mistake, etc. A judgment creates a debt which is non-contractual.

However, law treats it as falling within the sphere of a contract. According to Blackstone: "Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." According to Lord Esher: "The liability of the defendant arises upon the implied contract to pay the amount of the judgment."

In certain torts, the plaintiff has the choice to treat the obligation which is really a tort as if it were contractual. If *A* wrongfully sells the goods of *B*, *B* can sue *A* for damages in tort. However, *B* may elect to waive the tort and sue *A* instead on a fictitious contract. *B* can demand from *A* the payment of money received by him as if he were the agent of *B*. Here, the law presumes the contract and an implied term to pay. In the same way, if *A* obtains money from *B* by deceitful means, *B* can sue *A* either in tort for damages for the deceit or on a fictitious contract for the return of the money. *X* may take the goods of *Y* on loan and then sell them. *X* is liable in tort but *Y* can waive that remedy and sue *X* for the price of the goods as if *X* had sold them as the agent of *Y*. Sections 68 to 72 of the Indian Contract Act deal specifically with *quasi-contracts* which are not founded on actual promises but where the law presumes a contract between the parties.

There are many *reasons* which have been responsible for the *recognition of fiction in quasi-contractual obligations*.

(i) The first reason is that the classification of obligations into contractual and delictal obligations is not exhaustive. Although the remedy of contractual obligations is liquidated damages and of delictal obligations is uncertain damages, yet this cannot be the basis of distinction. In certain torts, damages may be liquidated. This is so in the case of the price of goods wrongfully sold.

(ii) The second cause is the desire to supply a theoretical basis for new forms of obligations as established by judicial decision. Legal fictions are of use in assisting the development of law. It is easier for the courts to maintain that a man is bound to pay because he has promised to do so than to lay down for the first time the principle that he is bound to pay whether he has promised to do so or not.

(iii) Another cause is the desire of the plaintiffs to obtain the benefit of the superior efficiency of contractual remedies. In the old days of formalism, it was better to sue on a contract than on any other ground. The contractual remedy was better than others. It was better than trespass and other delictal remedies. It did not die with the person of the wrongdoer but was available even against his executors. No wonder, the plaintiffs were allowed to allege fictitious contracts and sue on them.

Any rational system of law is free to get rid of the conception of *quasi-contractual* obligations. No useful purpose is served by it at the present day. However, it is still a part of the law of England.

(4) *Innominate obligations*: *Innominate obligations* are all those obligations which are other than those falling under the heads of contractual obligations, delictal obligations and *quasi-contractual* obligations. Examples of such obligations are the obligations of trustees towards their beneficiaries and other similar equitable obligations.

### SUGGESTED READINGS

- Dias and Hughes : *Jurisprudence*.  
 Paton : *Jurisprudence*.  
 Salmond : *Jurisprudence*.

## XX

# THE LAW OF PROCEDURE

### Law of Procedure and Substantive Law

According to Sir John Salmond: "The law of procedure may be defined as that branch of the law which governs the process of litigation." It is the law of actions and includes all legal proceedings whether civil or criminal. All the residue is substantive law. It relates not to the process of litigation but to its purpose and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks. Procedural law deals with the means and instruments by which those ends can be achieved. It regulates the conduct and relations of courts and litigants in respect of the litigation itself. Substantive law determines their conduct and relations in respect of the matters litigated. Procedural law regulates the conduct of affairs in the course of judicial proceedings. Substantive law regulates the affairs controlled by such proceedings. What facts constitute a wrong is determined by substantive law. What facts constitute proof of a wrong is a question of procedure. The first relates to the subject-matter of litigation and the second relates to the process merely. Whether an offence is punishable by fine or by imprisonment is a question of substantive law. Whether an offence is punishable summarily or only on indictment is a question of procedure. The abolition of capital punishment is an alteration of the substantive law. The abolition of imprisonment for debt is merely an alteration in the law of procedure. The reason is that punishment is one of the ends of the administration of justice but imprisonment for debt is merely an instrument to enforce payment. Substantive law relates to matters outside the courts but procedural law deals with matters inside courts.

It has rightly been pointed out that "*the law of procedure is not the same thing as the law of remedies*". The distinction that substantive law defines rights and procedural law determines

remedies is not a right one. The reason is that there are many rights which belong to the sphere of procedure. Examples are a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, etc. Moreover, rules of defining the remedy may be as such a part of substantive law as those defining the right itself. No one can call the abolition of capital punishment a change in the law of criminal procedure. The substantive part of criminal law deals not only with crimes but also with punishments. Likewise, in civil law, the rules regarding the measure of damages pertain to substantive law. The rules determining the classes of agreements which can be specifically enforced are substantive law in the same way as those rules which determine the agreements which can be enforced at all. To quote Salmond: "To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available." The real distinction between substantive law and procedural law is that one relates to the definition of rights and remedies and the other to the process of litigation.

According to Salmond, *the difference between substantive law and procedural law is one of form and not of substance*. A rule belonging to one class may, by a changed form, pass over into the other without materially affecting the practical issue. In legal history, such changes are frequent. Salmond refers to *three classes* of such cases.

(a) As regards the first class, an exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence is that a contract can be proved only by a writing. This corresponds to a rule of substantive law that a contract is void unless it is reduced to writing. In one case, the writing is the exclusive evidence of title. In the other case, the writing is a part of the title itself. For most purposes, the distinction is one of form and not of substance.

(b) As regards the second class, a conclusive evidential fact is equivalent to and tends to take the place of the fact proved by it. All conclusive presumptions pertain in form to procedure but

in effect to substantive law. Procedural law says that a child under the age of 8 cannot have a criminal intention and substantive law exempts such a child from punishment. It is a conclusive presumption of law that the acts of a servant are done with the authority of his master. This is a rule of procedure. However, there is also the substantive law which makes the employer liable for the acts of his employees. Originally, a bond was considered as a conclusive proof of the existence of the debt. At present, it is considered to be creative of a debt. Thus, it has passed from the domain of procedure into that of substantive law.

(c) The limitation of actions is the procedural equivalent of the prescription of rights. The legal procedure destroys the bond between right and remedy and substantive law destroys the right itself. The legal procedure leaves an imperfect right subsisting. Substantive law leaves no right at all. However, their practical effect is the same in both cases although the forms are different.

According to Pollock: "The most important branches of the law of procedure are the rules of pleading and the rules of evidence. It is obvious that, if litigation is to be concluded at all, a court of justice must have some kind of rule or usage for bringing the dispute to one point or some certain points, and for keeping the discussion of contested matters of fact within reasonable bounds. Rules of pleading are those which the parties must follow in informing the court of the question before it for decision, and in any case of difficulty enabling the court to define the question or questions. Rules of evidence are those by which the proof of disputed facts is governed and limited. In English practice the sharp distinction between the office of the court as judge of the law and the jury as judge of the fact has had a profound effect in shaping and elaborating both classes of rules. Indeed, it may be said to have created our peculiar law of evidence, for where a judge deals freely with both law and facts, as in the old Court of Chancery and its successor the Chancery Division, no need is felt, except as to definite requirements of form, for laying down hard and fast rules outside the general tradition of judicial discretion. Pleading, down to our own days, was a highly artificial system of which one object, sought by

advocates for both good and bad reasons, was to obtain clear decisions of the court on points of law disengaged from contest on the facts. In the matter of evidence it was the interest of the court, the profession, and the public alike to keep the jury within the bounds of the law as laid down to them by the judge, to prevent them from being influenced by the mere gossip, and to guard the independence of witnesses while providing effectual means for testing their credibility. These objects were not attained in either case without drawbacks. Rules intended only for guidance were handled as if they were ends in themselves, and used as mere counters in the game of skill between advocates. The intricacies of pleading became a scandal, and mischief of the like sort, though comparatively slight, left its mark on the rules of evidence also. Pleading has now been reduced to the simplest forms yet not always to very simple practice—in England and many other English-speaking jurisdictions; but our law of evidence, in the opinion of those who have studied it most, is still too complicated.” (*Jurisprudence and Legal Essays*, pp. 43-44).

### **Elements of Judicial Procedure**

The normal elements of judicial procedure are five in number, *viz.*, summons, pleading, proof, judgment and execution. The object of the summons is to secure for all parties interested an opportunity of presenting themselves before the court and making their case heard. Pleadings bring to light the matters in issue between the parties. In civil law, proceedings consist of the plaint, written statement and the replication. In criminal law, the proceedings include the complaint and the written statement, if any. Proof is the process by which the parties supply the court with the data necessary for the decision of the case. A judgment is a decision of the court. It may be in the form of a decree or an order. Execution is the process by which the court enforces a decree. It is the act of completing or carrying into effect the judgment. In the stage of execution, any property can be attached or sold. The debtor can be arrested and put in prison. A receiver can be put in charge of property.

### **Definition of Evidence**

According to Salmond, evidence may be defined as any fact

which possesses probative force. One fact is evidence of another when the existence of the former creates a reasonable belief in the existence of the other. The quality by virtue of which it has such an effect is called probative force.

According to Phipson: "Evidence, as the term is used in judicial proceedings, means the facts, testimony and documents which may be legally received in order to prove or disprove the fact under enquiry."

According to Taylor, evidence includes "all the legal means exclusive of mere argument, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation".

According to Section 3 of the Indian Evidence Act, evidence means and includes all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry and all documents produced for the inspection of the court.

The terms evidence and proof are not synonymous. Proof is the effect of evidence. Proof consists of that fact which either immediately or mediately tends to convince the mind of the truth or falsehood of a fact. Proof is the effect of evidence and evidence is the medium of proof. Evidence is the foundation of proof in the same way as a house is built out of bricks and mortar. All evidence is not proof.

### *Kinds of Evidence*

(1) Evidence is of many kinds. It may be judicial or extra-judicial. *Judicial evidence* is that which is produced before the court. It consists of all facts which are actually brought to the knowledge and observation of the court. *Extra-judicial evidence* is that which does not come directly under judicial cognizance. However, it is an important intermediate link between judicial evidence and the fact requiring proof. Judicial evidence includes all evidences given by witnesses in the court, all documents produced in the court and all things personally examined by the court. Extra-judicial evidence includes all evidential facts which are known to the court only by way of inference from some form



of judicial evidence. Testimony is extra-judicial when it is judicially known only through the relation of a witness who heard it. If a confession of a guilt is made to a court of law, it is judicial evidence. Such a confession is extra-judicial if it is made somewhere else but is proved before a court of law by some form of judicial evidence. If a document is actually produced in the court, it is judicial evidence. If a document is known to the court only through a copy or the report of a witness who has read it, it is extra-judicial evidence. In every case, some judicial evidence is absolutely essential but extra-judicial evidence may be there or may not be there. When extra-judicial evidence is present, it forms an intermediate link between the principal fact on the one hand and judicial evidence on the other. Judicial evidence requires mere production and extra-judicial evidence stands itself in need of proof.

(2) Evidence may be *personal* or *real*. Personal evidence is also called testimony and includes all kinds of statements regarded as possessed of probative force. Personal evidence is the most important form of evidence. It may be oral or written and judicial or extra-judicial. Real evidence includes the residue of evidential fact. Anything which is believed for any other reason than that someone has said so, is believed on real evidence. Real evidence may be judicial or extra-judicial. According to Bentham, real evidence denotes "all evidence of which any object belonging to the class of things as the source, persons being included in respect of such properties as belong to them in common with things". In this sense, real evidence may be immediate or reported.

(3) Evidence may be *primary* or *secondary*. Primary evidence is immediate evidence of the principal fact. A document is the primary evidence of its contents. Secondary evidence is such that a more immediate evidence than it exists. A copy of a document or oral evidence is secondary evidence of the contents of the document. Secondary evidence should not be allowed when primary evidence is available as it is inferior to primary evidence.

(4) Evidence may be *direct* or *circumstantial*. Direct evidence is testimony relating immediately to the principal fact. All other

evidence is circumstantial. Direct evidence is the testimony of a witness relating to the precise point in issue. It is evidence of a fact perceived by a witness with his own senses. If *A* says that he saw *B* committing the murder, the evidence of *A* is direct evidence. Circumstantial evidence is that evidence which relates to a series of facts other than the fact in issue but which are closely connected with that fact in such a way that it leads to some definite conclusion. According to Keeton, circumstantial evidence is the evidence of facts other than those of which proof is required, but from the existence of which proof of desired facts can necessarily be inferred. *X* states that he saw *T* leaving the place where *Z* was murdered and that *T* had a blood-stained dagger in his hand. The evidence of *X* is circumstantial evidence. Law requires that circumstantial evidence should be used with caution.

(5) Original evidence is that which possesses an independent probative force of its own. The witness states what he has seen or heard with his own eyes or ears. Hearsay evidence is not based on the personal knowledge of the witness. He makes the statement on the basis of the statement of another person. Two factors have to be taken into consideration in this connection. The person giving the evidence may be suppressing facts. It is also possible that the person who originally made the statement may not have been honest. Ordinarily, hearsay evidence is not accepted. However, there can be certain exceptions to the general rule.

### *Production of evidence*

The law of evidence is concerned with the production of evidence and its valuation. As regards the production of evidence, many rules have been laid down for the production of documents and the examination of witnesses. The object of these rules is to avoid unnecessary expense, delay and vexation. Considerations of public policy also play their part. There are certain witnesses who cannot be forced to disclose facts which are known to them and which are material to the point in issue. A reference to the Indian Evidence Act shows that a judge or a magistrate cannot be forced to answer any question regarding his own conduct except

under the special orders of a superior court. Communications during marriage are also privileged. Neither the husband nor the wife can be compelled to disclose any communication made to him or her during marriage. The unpublished records of the State are also privileged. They cannot be produced by any person except with the permission of the head of the department concerned. Likewise, the official communications are also privileged. If the public interests so demand, no public officer can be compelled to disclose communications made in official confidence. No magistrate or police officer can be compelled to disclose the source of his information regarding an evidence. Professional communications are also privileged. No lawyer can be forced to disclose the communications between him and his client. However, this can be done with the consent of the client. No accused person can be compelled to answer any question which is likely to incriminate him. Even if a confession is to be made by an accused person, that must be done absolutely voluntarily. There should be no inducement, threat or promise. Any violation of this rule makes a confession useless in the eye of law. Witnesses are called upon to take an oath before making their statements. The object of the oath is to find out the truth. However, in modern times, the sanctity of oath has been completely lost and the whole affair has become mechanical. Any party to litigation which puts trust in an oath is bound to come to grief.

### *Probative value of evidence*

When all the evidence has been produced, the same has to be evaluated. Many rules have been laid down to weigh the value of the evidence produced in the court.

(1) *Conclusive proof* consists of facts which have such probative force that they cannot be contradicted. When one fact is declared by law to be the conclusive proof of another fact, the court shall on proof of one fact, regard the other as proved. It shall not allow evidence to be produced for the purpose of disproving it. Conclusive presumptions are inferences which must be drawn and cannot be allowed to be overruled by any evidence howsoever strong it may be. Section 112 of the Indian Evidence Act provides that if a child is born during wedlock or within 280 days

after the dissolution of marriage between the mother and the father, the mother remaining unmarried, it shall be conclusive proof of the legitimacy of the child. Likewise, Section 80 of the Indian Penal Code provides that a child under the age of 7 is presumed by law to be incapable of committing any offence.

(2) *Presumptive proof* means such proof which may be considered sufficient if there is no other proved fact to the contrary. In such a case, a rebuttable presumption is raised. The presumption can be proved to be wrong by contrary evidence. Unlike conclusive proof, the court allows contrary evidence to be led to disprove the presumption.

(3) If law prescribes a certain amount of evidence to be absolutely necessary and the evidence produced does not come up to the necessary standard, the evidence is considered to be insufficient. The courts are not allowed to act upon such evidence. According to English law, the evidence of one witness is not sufficient to hold a person guilty of the offence of treason. There is no such express rule of law on this point in India. A will requires to be attested by two witnesses and if a will has been attested only by one witness, no court will take cognizance of it.

(4) In the case of *exclusive evidence*, certain facts alone are recognised as being the only evidence of certain other facts. No other evidence is permitted by law. The execution of a will can be proved only by the testimony of one attesting witness. However, the case is otherwise if the attesting witnesses are dead. If a contract, grant or assignment is reduced to writing or is required by law to be made in writing, in that case only the writing itself is admissible to prove the contract, assignment or grant. It is a case of exclusive evidence.

(5) There are certain facts which have absolutely no probative force at all. They can neither be produced in the court nor acted upon. No court can take cognizance of such non-essential facts. For example, hearsay evidence is no evidence and is ordinarily excluded. Likewise, the bad character of the accused

is ordinarily irrelevant in criminal proceedings. It becomes relevant only if evidence has been given to show that he possesses a good character.

### SUGGESTED READINGS

- Diamond : *Primitive Law*.  
Jackson : *Machinery of Justice in England*.  
Mullins, C : *In Quest of Justice*.  
Paton : *Jurisprudence*.

---

## LEGAL THEORY

---



## XXI

### LEGAL THEORY

Legal theory reveals the manner in which people in different countries at different times have speculated about some of the problems concerning law. Speculations about law by past and present thinkers should be a part of intellectual culture. Even where legal theories are open to criticism, they possess value and later theories can be better understood in the light of them. It is not enough for a lawyer to understand what law is today but he should also study how people have been thinking about law in the past. That is the only way to stimulate thinking on law. Hence the importance of legal theory for students of law.

Dr. W. Friedmann writes in his book *Legal Theory* that all systematic thinking about legal theory is linked at one end with philosophy and at the other end, with political theory. Sometimes the starting point is philosophy and political ideology plays a secondary part and sometimes the starting point is political ideology as is the case with legal theories of Socialism and Fascism. Sometimes, the theory of knowledge and political ideology are welded into one coherent system. However, all legal theory must contain elements of philosophy and gain its colour and specific content from political theory. All thinking about the end of law is based on conceptions of man both as a thinking individual and a political being. (p. 3).

Some legal philosophers have been philosophers first and foremost and jurists for the sake of the completeness of their philosophical system. Some legal philosophers have been politicians first and foremost and jurists because they felt the need to express their political thought in a legal form. Before the 19th century, legal theory was essentially a by-product of philosophy, religion, ethics or politics. The great legal thinkers were primarily philosophers, churchmen and politicians. The shift from the philosopher or politician's legal philosophy to lawyer's legal philosophy has taken place in recent times. There have been researches in law on a large



scale and also changes in the techniques. The new era of legal philosophy arises mainly from the confrontation of the professional lawyer with the problems of social justice in his legal work. Earlier, legal theories rested on general philosophical and political theories but modern legal theories can be discussed in the idiom and thought of the lawyer. The modern legal theory is based on beliefs whose inspiration comes from outside law itself.

Legal theory stands between philosophy and political theory. It takes its intellectual categories from philosophy and ideas of justice from political theory. Its contribution lies in formulating political ideas in terms of legal principles.

Legal theory reflects the fundamental philosophical controversy whether the universe is an intellectual creation of the ego or the ego is a particle in the universal order of things. All kinds of theories on the natural law place an objective order of things above the individual. The intellectual priority of the ego over the world was first established by Descartes and was developed by Kant. The latter established the individual as the creator of the intelligible world of phenomena. The view of Fichte was that the world was the result of the self-consciousness of the individual. Hegel projected the individual into the universe.

In the philosophy of Kant, the domain of will is practical reason and the domain of knowledge is pure reason. Ethical and legal ideals are a matter of will and not of thought. The legal philosophy of Hegel established the supremacy of the will of the State. Relativist legal philosophy as developed by Jellinek and Radbruch acknowledges the subjective character of legal ideologies by stating the principal ideological issues and leaving the choice between them to individual decision.

There was a cyclical movement in legal theory. The "charismatic" law-finder of primitive communities found the law intuitively. The philosopher-king of Plato knew and applied justice because his personality gave him insight and virtue. Systematisation of law goes parallel with a more rational attitude. When a generation is dissatisfied with positivism, instinct and intuition come to the fore. The Dutch jurist Krabbe appeals to the *Rechtswusstsein* in order to limit the unfettered legislative

sovereignty of the State. Petrazhitsky opposes intuitive law to an objective and positive law. Del Vecchio establishes a theory of juristic sentiment of right capable of weighing specific grades of truth. According to Edmond Cahn, the "sense of injustice" is the motive force which drives the law forward. Geny allocates the principles of reason to the facts of law which are the object of intellectual perception. Juristic action moulds those facts in accordance with the needs of life. In modern totalitarian legal theories, there is emphasis on instinct and feeling and not on intellect and reason.

Legal theory reflects the struggle of law between tradition and progress, stability and change, certainty and flexibility. Legal theories and lawyers are inclined to put more emphasis on stability than change. Kelsen suspects all natural law theories as devices for strengthening the existing authorities and suppressing change. Max Weber emphasises the revolutionary aspect of certain natural law ideologies.

The scholastic theory of natural law attempted to stabilise the existing order of things by anchoring it in the divine order acting through natural law. Scholars like Le Fur and Cathrein oppose socialist revolution.

The historical school of Savigny opposes legal change. According to that school, the function of law is to stabilise and not to be an agent of progress. The task of a jurist is to verify and formulate the existing legal customs. Analytical positivism tends to regard stability and certainty as the paramount objectives of legal interpretation. All utilitarian and sociological theories emphasize the changing content of law. Law must change in a manner to get pleasure and avoid painful change with social circumstances.

Ihering rejects the idea of a universal law for all nations for all times. According to him, that idea is "no better than that medical treatment should be the same for all patients".

According to Duguit, the needs of the community change with social circumstances. The claims of employers and employees and landlords and tenants change as life and organisation of a community change. Law must be elastic. It must create a just

balance in accordance with the social needs and ideals prevailing at the time. Roscoe Pound calls it "Social Engineering". The Marxian legal theory and modern totalitarian theory made the law changeable at will by making it dependent upon outside agencies. The legal changes are made quickly through the constitutional machinery of a totalitarian State. The machinery of the American Constitution keeps legal change within bounds. A written constitution tends to stabilise law. The British constitutional system facilitates legal change. However, technique is always subordinate to the mind which directs it. The ultimate legal ideals decide the use to which the machinery is to be put.

Idealistic legal theories deduce law from first principles based on man as an ethical and rational being. Positivistic legal theories consider law as necessarily determined by the subject-matter. The two principal types of positivism in legal theory are analytical and functional or pragmatic positivism. Analytical positivism concentrates on the analysis of legal concepts and relations. Functional positivism regards social facts as determining legal concepts. Marxism regards all law as a superstructure determined by economic substratum or the ownership of the means of production.

Duguit is an idealist disguised as a materialist, an empiricist by profession and *a priori* philosopher at heart. His "social solidarity" is in reality a modern natural law idea. The legal theory of Herbert Spencer is the expression of the belief in the evolution of man towards greater freedom through industrial organisation.

Legal theories assume one of three attitudes. Either they subordinate the individual to the community, or they subordinate the community to the individual or they attempt to blend the two. We find in Plato the supremacy of the community over the individual. In the Republic of Plato, there is no room for private rights or private institutions like family and property. These institutions are recognised in the "Laws" of Plato but they are still under the strict supervision of the State. In the philosophy of Plato, there is no protection for the development of the individual. The Greek conception of life is inseparable from the development of personality. Under modern totalitarianism, there is

supremacy of the community and the destruction of the rights of the individual. The Catholic theory of society makes the community supreme over the individual. He has to accept the place and function into which he is born. Authority over the individual is divided between the Church and the State. However, the Church is supreme as the authoritative interpreter of divine and natural law. Individualism is the basis of the political and legal theory of Locke. Individualism underlies the legal philosophy of Stammler and Del Vecchio. Bentham's utilitarianism and the theory of evolution of Spencer embody an individualistic philosophy. The American Constitution expresses individualistic philosophy of law. The Legal philosophy of Hegel combines the idea of individual autonomy with the superior power of the community. The individual of Hegel must will the State or his will is not rational. He has no individual rights which can be put against the will of the State. According to Hegel, the State will always protect individual liberty. According to Fichte, there is a genuine synthesis of individual autonomy and needs of the community. Individual liberty is considered in the framework of the social and economic life of the community. According to Radbruch, while translating the equality of man in terms of formal and legal rights and social and economic reality, there must not be absolute subservience of the individual to the community.

The theories of Locke and Rousseau do not explain how the supreme rights of the majority can go together with the inalienable rights of the individual. The individualism of Hobbes is associated with absolutism. The collectivism of Duguit is strongly autocratic. It subjects governors and the governed to an objective principle.

Individualist legal theories are often cosmopolitan theories. The assertion of natural rights is linked with a revolt against the State. Politically, the issue between nationalism and internationalism is one of clashing political ideals. However, from the law point of view, it is merely a question of the entity to which legal sovereignty is to be attributed.

## SUGGESTED READINGS

- Barker : *Introduction to Gierke: Natural Law and the Theory of Society*, 1934.
- Dias, R. W. : *Jurisprudence*, London, 1976.
- Friedmann, W. : *Legal Theory*
- Kelsen . *Interpretations of Modern Legal Philosophies.*
- Pound, Roscoe : *Law and Morals.*
- Russell : *A History of Western Legal Philosophy*, 1946.

## XXII

# ANALYTICAL LEGAL POSITIVISM

### Different Approaches

At various times and places, jurists have made their approaches to the study of law from different angles. They have defined law, determined its sources and nature and discussed its purpose and ends. For the sake of clarity and convenience in understanding their points of view, the jurists are divided into different schools on the basis of their approaches to law. It is not denied that any such division may not be comprehensive or exact. There may be jurists who may not fall within the strict bounds of any one school. Some of the schools may be merely a synthesis of two approaches. However, in spite of all this, the division is helpful in understanding the evolution of legal philosophy.

Great attention was given to the study of law by men belonging to the profession of law, whether as teachers of law or as practising lawyers. They were merely concerned with positive law which had little to do with vague and abstract notions of natural law. They started demarcating the proper bounds of law and analysing and systematising it. They advocated the reform of law in the light of changed social needs and conditions and not on extraneous considerations. They laid more and more emphasis on the analysis of positive law and they came to be called "positivists" or "analysts". Though John Austin is considered to be the father of the new approach, he owed much to Bentham and on many points his propositions were no more than a "paraphrasing of Bentham's theory".

### Positivism in Law

In the words of Prof. Dias, the positivist movement started at the beginning of the 19th century. It represented a reaction against the *a priori* methods of thinking which turned away from the realities of actual law in order to discover in nature or

reason the principles of universal validity. Actual laws were explained or condemned according to those principles.

Prof. Hart points out that the term "positivism" has many meanings. One meaning is that laws are commands. This meaning is associated with Bentham and Austin who were the founders of British positivism. The second meaning is that the analysis of legal concepts is worth pursuing, distinct from sociological and historical inquiries and critical evaluation. The third meaning is that decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality. The fourth meaning is that moral judgments cannot be established or defended by rational argument, evidence or proof. The fifth meaning is that the law as it is actually laid down has to be kept separate from the law that ought to be. It is the fifth which seems to be currently associated with positivism. It may spring from a love of order which aims at the clarification of legal concepts and their orderly presentation. Precision may be difficult but it is commendable and profitable. Positivism flourishes best in stable social conditions. It is the intellectual reaction against naturalism and a love of order and precision.

Positivists do not deny that judges make law. As a matter of fact, a majority of them admit it. They also acknowledge the influence of ethical considerations on judges and legislators as a judge or legislator adopts a proposition when it is considered to be moral and just. What they maintain is that it is only incorporation in precedent, statute or custom that imparts a quality of law to a precept. Even if an unjust proposition is embodied in precedent or statute, it will be law. Every proposition which passes through one or other of the accepted media is law irrespective of all other considerations. The positivists distinguish between formal analysis and historical and functional analysis. They do not deny the value of historical and functional analysis but maintain that they should be kept apart from formal analysis. There is one inherent difficulty as it is seldom possible to study institutions as they are except in the light of their history and function. Many can be understood only in the light of their origins and past influences.

A total separation of the law as it is and the law as it ought

to be cannot be maintained. However, there must be some degree of separation for practical purposes. Such a separation is desirable in the interest of society. A separation between the "is" and the "ought" is useful in providing a standard by which positive law can be evaluated and criticised. The importance of being able to tell as clearly and simply as possible whether this is, or is not, a law at any given point of time is obvious. The introduction of morality will create difficulties. Morality is a diffuse idea and no one, not even a naturalist, maintains that everything which is moral is law. As the area of law is bound to be narrower than that of morality, its boundary should be made as clear as possible.

### Analytical School

The analytical school is known by different names. It is called the Positive School because the exponents of this school are concerned neither with the past nor with the future of law but with law as it exists, i.e., with law "as it is" (*positum*). The school was dominant in England and is popularly known as the English School. Its founder was John Austin and hence it is also called the Austinian School. This school takes for granted the developed legal system and proceeds logically to analyse its basic concepts and to classify them in order to bring out their relation to one another. This concentration on the systematic analysis of legal concepts has given this school the name of Analytical Jurisprudence. The first concern of the jurists is to understand the structural nature of a legal system and for this purpose, discussions of justice are not only irrelevant but also dangerously confusing. Such an approach to law is commonly termed analytical and such writers are often styled Analytical Positivists. The term positivism was invented by Auguste Comte, a French thinker.

The purpose of analytical jurisprudence is to analyse, without reference either to their historical origin or development or their ethical significance or validity, the first principles of law. According to Salmond, a book of analytical jurisprudence will deal with such subjects as an analysis of the concept of law, an examination of the relation between civil law and other forms of law, an analysis of the various constituent ideas of which the



complex idea of law is made up such as the State, sovereignty and administration of justice, an account of the legal sources from which law proceeds, together with an investigation of the theory of legislation, judicial precedents and customary law, an inquiry into the scientific arrangement of law into distinct departments along with an analysis of distinctions on which the division is based, an analysis of the concept of legal rights along with the general theory of the creation and transfer of rights, an investigation of the theory of legal liability in civil and criminal cases and an examination of other relevant legal concepts.

The main task of the Analytical School is the lucid and systematic exposition of the legal ideas pertinent to a simpler and maturer system of law. It starts from the actual facts of law as it sees them today. It endeavours to define those terms, to explain their connotation and show their relations to one another. One purpose of the Analytical School is to gain an accurate and intimate understanding of the fundamental working concepts of all legal reasoning.

The Analytical School takes law as the command of the sovereign. It puts emphasis on legislation as the source of law. The whole system is based on its concept of law. Analytical jurisprudence does not create its premises: these premises are furnished by law itself. It is the function of Analytical Jurisprudence to accept these premises and to decompose them into their final atomic elements in an organised juristic system. This school regards law as a closed system of pure facts from which all norms and values are excluded. Friedmann writes: "The analytical lawyer is a positivist. He is not concerned with ideals; he takes the law as a given matter created by the State whose authority he does not question. On this material he works, by means of a system of rules of a legal logic, apparently complete and self-contained. In order to be able to work on this assumption, he must attempt to prove to his own satisfaction that thinking about the law can be excluded from the lawyer's province. Therefore the legal system is made watertight against all ideological intrusions and all problems are concluded in terms of legal logic." (*Legal Theory*, p. 241).

The importance of analytical jurisprudence lies in the fact

that it brought about precision in legal thinking. It provided us with clear, definite and scientific terminology. It fulfilled the object of "clearing the heads and untying knots" as envisaged by Austin. It deliberately excluded all external considerations which fall outside the scope of law. Prof. Gray writes: "Especially valuable is the negative side of analytical study. Most of us hold in our minds a lot of propositions and distinctions, which are in fact absurd, and which we believe, or pretend to ourselves to believe, and which we impart to others, as true and valuable. If our minds and speech can be cleared of these, there is no small gain."

Julius Stone observes: "Analytical jurisprudence as the study of logical relations within the law serves, therefore, a useful purpose. Its main tasks are to deter and define the terms actually employed, to state the axioms actually employed, to examine whether legal propositions ostensibly deduced from them do follow in logic and to inquire what definitions and axioms might yield a maximum of self-consistency in the body of legal propositions." (*The Province and Function of Law*, p. 52).

The chief exponents of the Positivist or Analytical School in England are Bentham, Austin, Sir William Markby (1829-1914), Sheldon Amos (1835-1886), Holland (1835-1926), Salmond (1862-1924) and Prof. H.L.A. Hart (1907). This school received encouragement in the United States from Gray and Hohfeld and on the continent of Europe from Kelsen, Korkunov and others.

#### *Bentham (1742-1832)*

Prof. Dias points out that until recently John Austin used to be styled the "father of English Jurisprudence", but it is now clear from a work of Bentham first published in 1945 that it is he, if any one, who deserved such a title. Lord Lloyd writes that *Of Laws in General* is Bentham's main contribution to analytical jurisprudence but it was not until 1970 that we had an authoritative edition. Its editor writes with justification that "had it been published in his lifetime, it, rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence". Lord Lloyd maintains that this work does not stand in isolation from Bentham's censorial jurisprudence. Bentham was

a lifelong reformer of law and he believed that no reform of substantive law could be brought about without a reform of its form and structure. A thoroughly scientific conceptual framework was a prelude to reform. (*Introduction to Jurisprudence*, p. 174).

Like Austin's theory, Bentham advocated an imperative theory of law in which the key concepts are those of sovereignty and command. Bentham "expounds these ideas with far greater subtlety and flexibility than Austin and illuminates aspects of law largely neglected by him" Austin's 'sovereign is postulated as an illimitable, indivisible entity but Bentham's sovereign is neither. There may be sound practical reasons for having one all-powerful sovereign, but Bentham saw the distinction between social desirability and logical necessity, which Austin did not. From a conceptual standpoint, there is no necessity for a sovereign to be undivided and unlimited. As a matter of fact, in the complex societies which have now developed, quite the reverse is true. Bentham accepts divided and partial sovereignty. He discussed the legal restrictions that may be imposed upon the sovereign power To quote him: "The business of the ordinary sort of law is to prescribe to the people what *they* shall do: the business of this transcendent class of laws is to prescribe to the sovereign what he shall do." Bentham believes a sovereign may bind his successors. "If by accident a sovereign should in fact come to the throne with a determination not to adopt the covenants of his predecessors, he would be told that he had adopted them notwithstanding." Though he thought that enforcement would be extra-legal (moral or religious), he did not rule out the use of legal sanctions.

Sanctions generally play a less prominent part in the theory of Bentham than they do in that of Austin. Bentham thought that a sovereign's command would be law even if supported only by religious or moral sanctions. Bentham's account admits "alluring motives", the concept of rewards.

What chiefly differentiates Bentham from Austin and makes him an interesting philosopher of law is that he was a conscious innovator of new forms of enquiry into the structure of law. He made explicit his method and general logic of enquiry in a way in which no other writer on those topics does. When Austin's definition of law is compared with that of Bentham, the contrast becomes

clear. On the surface they are similar. Both are framed in terms of superiority and inferiority, in terms of conduct to be adopted by those in the habit of obedience to a sovereign. The similarity ends here. The model of Austin was the criminal statute. Bentham has undertaken "rational reconstruction" which is wider than the model of Austin.

There is another difference between Austin and Bentham regarding the concept of law. According to Bentham, a command is only one of four "aspects" which the will of the legislator may bear to the acts concerning which he is legislating. Bentham believes that an understanding of the structure of law entails an appreciation of the "necessary relations" of "opposition and concomitancy" between these four aspects of the will of the legislator. To demonstrate these relationships, Bentham developed the logic of imperatives. Bentham can rightly claim to be the discoverer of this pattern of thought. This committed Bentham to the view that there are no laws which are neither imperative nor permissive. All laws command or prohibit or permit some form of conduct.

Lord Lloyd writes that the analysis of Bentham steers clear of a number of pitfalls into which Austin fell. Bentham's *Of Laws in General* is undoubtedly the best defence of the imperative theory. Like Austin, Bentham is rooted to the concepts of sovereignty and the habit of obedience which are deficient in aim and unsatisfactory in scope. (*Ibid*, p. 177)

Bentham was a fervent champion of codified law and of reforming English law which was in utter chaos at that time. He distinguished between what he called an expository jurisprudence and "censorial" jurisprudence. In his book *An Introduction to the Principles of Morals and Legislation*, he was moved to ask questions about the penal code and civil code. While seeking the answer, he had to investigate the nature of law which led him to *Of Laws in General*. What was originally conceived as an appendix developed into a major contribution which was finished in 1782. It was published for the first time in 1945 as *The Limits of Jurisprudence Defined*. A revised edition was published in 1970, *Of Laws in General*, under the editorship of Prof. Hart.

According to Bentham: "A law may be defined as an

assemblage of signs, declarative of a volition, conceived or adopted by the *sovereign* in a State. concerning the conduct to be observed in a certain *case* by a certain person or class of persons who in the case in question are or are supposed to be subject to his power". Thus Bentham's concept of law is an imperative one. This definition is flexible enough to cover "a set of objects so intimately allied and to which there would be such continual occasion to apply the same propositions". The idea of mandate is so much watered down that it is not appropriate to rank Bentham among the imperative jurists. The imperative aspect of his theory is the least happy part of it.

Every law may be considered in eight different respects viz., source, subjects, objects, extent, aspects, force, remedial appendages and expression. The source of law is the will of the sovereign who may conceive laws which he personally issues or adopt laws previously issued by former sovereigns or subordinate authorities or he may adopt laws to be issued in future by subordinate authorities

Bentham's sovereign is "any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience and that in preference to the will of any other person". The attributes of sovereignty are interesting. Such power is indefinite unless limited by express convention or by religious or political motivations. The sovereign may consist of more than one body, each of which is obeyed in different respects. Habitual obedience may be divided and partial.

Every law has a "directive" and a "sanctional" or "incitative" part. The former concerns the aspects of the sovereign's will towards an act-situation and the latter concerns the force of a law. Command is only one of four aspects of sovereign's will, permutations of which comprehend the whole range of laws Bentham evolved a "deontic logic" with which to demonstrate the relationship between command, prohibition and permission.

As regards the force of a law, a law is dependent upon motivations for obedience. The wish of the sovereign in respect of a class of acts is a law as long as it is supported by a sanction. It includes physical, political, religious and moral motivations,

comprising threats of punishment and rewards. The failure to do or not to do what a law supported by punishment requires is illegal, but it is not illegal to do or not to do what a law supported by rewards requires. Bentham's analysis of sanction resembles that of Kelsen and the implication that sanction is a prediction based on probabilities foreshadows the views of American realists. However, he differed from both in separating the regulation of conduct and stipulation of sanction into two distinct laws.

According to Bentham, sanctions are provided by subsidiary laws, but they themselves require a further set of subsidiary laws, "remedial appendages", addressed to judges with a view to curing the evil, stopping the evil or preventing future evil.

The ways in which the will of the sovereign may be expressed are various. Expression may be complete and in that case a judge should adopt a literal interpretation. A judge can adopt a liberal interpretation only where the expression of the will of the sovereign is incomplete. Bentham was the enemy of judge-made law and he sought to minimise judicial discretion by trying to ensure that laws were complete, not only in expression, but also in "connection" and "design".

According to Bentham, the individuality of a law "results from the *integrality* and the *unity* of it laid together". The purpose of individuation "is to ascertain what a portion of legislative matter must amount to in order on the one hand not to contain less, on the other hand not to contain more than one whole law". A law should be complete in expression, in "connection" and in "design". Every law contains an imperative provision which may be qualified or unqualified, further expounded or unexpounded. If it is unqualified and unexpounded, it is complete in expression in itself. If it requires qualification or exposition, it is incomplete without these. Qualifications and expositions cannot be complete in themselves without the principal provision.

According to Bentham, more often than not parts of a law "lie scattered up and down at random, some under one head, some under another, with little or no notice taken of their mutual relations and dependencies". Those parts may have been brought into existence by different bodies at different times. They

needed to be coordinated before a law could be said to be complete in point of connection.

According to Bentham: "The unity of law will depend upon the unity of the species of the act which is the object of it." The way in which different species of acts are designated is largely a matter of wording dictated by convenience. Each act-situation is object of a separate law. Bentham did not assert that one species of act could give rise to only one offence. Two different laws can create two separate offences out of the same act, as where criminal offences are also tort.

According to Bentham, a penal code consists of laws creating "offences". A civil code consists of expository and qualificatory matter. Bentham's ultimate objective was an ideal code consisting of laws analysable jurisprudentially. Its penal and civil branches should be separated. Its advantages would be to minimise the risk of incompleteness of laws and the "licentiousness" of interpretation, to exhibit a common standard by which different systems might be compared and to create and improve the method of teaching the art of legislation. Bentham was so much convinced of the merits of a code that he remained a lifelong enemy of judge-made law. He was in favour of reducing the judicial functions.

Bentham's legal philosophy is called "Utilitarian Individualism". He criticised the method of law-making, corruption and inefficiency in the administration of justice and restraints on individual liberty. He was an individualist. His view was that the function of law is to emancipate the individual from bondage and restraint upon his freedom. Once the individual was made free, he would be able to look after his welfare. In this respect, he was a supporter of the *laissez faire* principle.

Bentham was also a utilitarian. According to him, the end of legislation is the "greatest happiness of the greatest number". He defined utility as the "property or tendency of a thing to prevent some evil or to produce some good". The consequences of good and evil are respectively pleasure and pain. To quote Bentham: "Nature has placed man under the empire of pleasure and pain. We owe to them all our ideas, we refer to them all

our judgments and all the determination of our life. He who pretends to withdraw himself from this subjection knows not what he says. His only object is to seek pleasure and to shun pain . . . These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principle of utility subjects everything to these two motives."

The purpose of law is to bring pleasure and avoid pain. Pleasure and pain are the ultimate standards on which a law should be judged. A consideration of justice and morality disappears from this approach

Friedmann refers to two shortcomings in the legal philosophy of Bentham. The first weakness was his abstract and doctrinaire rationalism which prevented him from seeing man in all his complexity. The result was that Bentham over-estimated the powers of the legislature and underestimated the need for individual discretion and flexibility in the application of law. The view of Bentham was that if the work of legislation was based on rational principles, there was the possibility of complete scientific codification of law. The differences among the various States did not discourage him. He did not attach much value to the interpretation of law by the judges. Another weakness was that Bentham failed to develop clearly his own conception of the balance between the individual and community interests. Bentham believed in the identity of the individual and communal happiness. He believed that freedom of enterprise will automatically lead to greater equality. Many of the propositions of Bentham are neither convincing nor true in practical application. The view of Bentham was that the interests of an unlimited number of individuals shall be automatically conducive to the interests of the community, as the freedom of enterprise will automatically lead to greater equality. However, this gave just the reverse results when it was put into practice. Likewise, pleasure and pain alone cannot be the test to judge a law.

According to Friedmann, the importance of Bentham in the history of legal thought is due to the fact that he linked philosophical premises with practical legal propositions. He placed individualism on a new materialistic basis. He related and subordinated the rights of the self-contained individual to



the happiness of the greatest number of individuals living in a community. He directed the aims of law to practical social purposes instead of abstract propositions. According to him, the main function of law was to provide subsistence, to aim at abundance, to encourage equality and to maintain security. The function of security was the most important. Bentham laid the basis for a new relativist tendency in jurisprudence called sociological jurisprudence. He related law to definite social purposes and a balance of interests. He put emphasis on the need and developed the technique of conscious law-making by codification as against judicial law-making or evolution by custom. It was the belief of Bentham that there were certain scientific principles of codification which could be applied in every country irrespective of the national and historical differences. (*Legal Theory*, p. 275).

The constructive thinking and zeal for legal reform on the part of Bentham heralded a new era of legal reform in England. Legislation has become the most important method of law-making in modern times. Bentham's definition of law and analysis of legal terms inspired many jurists who improved upon them and laid down the foundations of new schools of jurisprudence. He examined the problems of international law. As a matter of fact, he coined that name. The view of Prof. Dias is that had all the writings of Bentham been known before, he could have been the greatest single contributor to European jurisprudence. (*Jurisprudence*, p. 469).

### *John Austin (1790-1859)*

John Austin was born in 1790. He joined the Army at the age of 16 and served as a lieutenant in Malta and Sicily up to 1812. He resigned his commission in the army and started studying law. In 1818, he was called to the Bar. For seven years, he practised law but without success. In 1819, he married Sarah Taylor, a woman of great intelligence, energy and beauty. After their marriage, the Austins became neighbours of Bentham and the Mills in London.

When the University of London was founded, Austin was appointed Professor of Jurisprudence and he spent the next two

years in preparing his lectures. His opening lectures in 1828 were attended by John Stuart Mill, Romilly and others. After initial success, Austin failed to attract new students and he resigned the Chair in 1832. Through the efforts of his wife, an expanded version of the first part of the lectures was published in 1832 under the title of *The Province of Jurisprudence Determined*. Austin repeated the lectures in 1834 but without success and hence he gave up the teaching of jurisprudence altogether. In 1833, he was appointed to the Criminal Law Commission but he resigned after signing the first two reports. In 1836, he was appointed Commissioner to advise on the legal and constitutional reform of Malta and he got £ 3000 for his services. For the next ten years, he lived abroad in Germany and in Paris, supported by the earnings of his wife as a writer and translator. In 1848, the Austins went back to England and lived there in retirement. Austin died in 1859.

Austin wrote with extreme difficulty. He imposed on himself standards of precision and clarity that made work a torment. Between 1832 and 1859, he published only a couple of articles and a pamphlet *A Plea for the Constitution*. The second edition of *The Province of Jurisprudence Determined* was published by his widow in 1861. She also reconstructed from the notes of her husband *Lectures on Jurisprudence* or *The Philosophy of Positive Law* and published them in 1863.

Austin is called the father of English jurisprudence and the founder of the Analytical School. However, the title of Analytical School is misleading as it suggests that analysis is the exclusive property of this school instead of being the universal method of jurisprudence. Allen prefers to call Austin's school as the imperative school. However, it is contended that Austin does not fit exactly into any of the important schools. In some ways, he was the precursor of the pure science of law as he drew somewhat narrowly the boundaries of jurisprudence. He was not unmindful of the part played by ethics in the evolution of law. As a matter of fact, he devoted several lectures to the theory of utility. Finding work on jurisprudence full of confusion, he decided to confine jurisprudence to a study of law as it is, leaving the study of ideal forms of law to the science of legislation or philosophic jurisprudence.

*Austin's Theory of Law* : Austin's most important contribution to legal theory was his substitution of the command of the sovereign for any ideal of justice in the definition of law. He defined law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him". Law is strictly divorced from justice. Instead of being based on ideas of good or bad, it is based on the power of a superior. This links Austin with Hobbes and other theories of sovereignty. The first division of law is that into laws set by God to men (law of God) and laws set by men to men (human laws). In Austin's positivist system, the law of God seems to fulfil no other function than that of serving as a receptacle for Austin's utilitarian beliefs. The principle of utility is the law of God.

Human laws are divisible into laws properly so called (positive law) and laws improperly so called. The former are either laws set by political superiors to political subordinates or laws set by subjects, as private persons, in pursuance of legal rights granted to them. As an example, Austin gives the rights of a guardian over his ward. As the legal nature of such rights derives from the indirect command of the superior who confers such right on the guardian, every enforceable private right must fall within this category. Laws improperly so called are those laws which are not set, directly or indirectly, by a political superior. In this category are diverse types of rules such as rules of clubs, laws of fashion, laws of natural science, the rules of so-called international law etc. To all these, Austin gives the name of "Positive Morality". Laws improperly so called also included a final category called "laws by metaphor" which covered expression of the uniformities of nature.

According to Austin, positive law has four elements viz., command, sanction, duty and sovereignty. In the words of Austin : "Laws properly so called are a species of commands. Being a command, every law properly so called flows from a determinate source. Whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear and the latter is obnoxious to an evil which the former intends to inflict in case the wish is disregarded. Every sanction properly so called is an eventual evil annexed to a command. Every duty properly so called supposes a command by which it is created and duty properly

so called is obnoxious to evils of the kind. The science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness. All positive law is deduced from a clearly determinable law-giver as sovereign. Every positive law is set by a sovereign or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.”

Prof. Dias points out that the distinctions drawn by Austin were entirely arbitrary. Although Austin did not say so specifically, he fashioned his concept out of the material of English law with an occasional sprinkling of Roman law, but he proceeded to use it as a criterion of law in general and so excluded international law. He was also misguided in applying the epithet “proper” to what was, after all, his own stipulative definition of “law”.

According to Austin, a law is a command of the sovereign backed by a sanction. Duty and sanction are co-relative terms, the fear or sanction supplying the motive for obedience. Prof. Dias criticises this view. His view is that the fear of sanction is not the sole or even the principal motive for obedience. There are many objections to the association of duty with sanction. Another weakness is that Austin found himself compelled to treat nullity as a sanction in order to accommodate, e.g., the rule, “you must make a gratuitous promise under seal”, within his command-duty-sanction model.

To define law as a command can mislead us in many ways

(1) Though the definition of Austin applies to certain portions of law such as criminal law, the greater part of a legal system consists of laws which neither command nor forbid things to be done, but which empower people by certain means to achieve certain results, e.g., laws giving citizens the right to vote, laws conferring on leaseholders the right to buy the reversion, laws concerning the sale of property and making of wills. The bulk of the law of contract and of property consists of such power-conferring rules.

(2) The term command suggests the existence of a personal commander. In modern legal systems, the procedures for legis-

ation may be so complex as to make it impossible to identify any commander in this personal sense. This is particularly so where sovereignty is divided as in federal States.

(3) Command conjures up the picture of an order given by one particular commander on one particular occasion to one particular recipient, but law can and does continue in existence long after the extinction of the actual law-giver. An argument is put forward that laws laid down by a former sovereign remain law only in so far as the present sovereign is content that they should continue. What the sovereign permits, he impliedly or tacitly commands. However, it is not always true that the present sovereign can repeal any law. In certain States, the law-making powers of the sovereign are limited by the Constitution which prevents the repeal by ordinary legislation of the entrenched clauses. In such cases, the question of the present sovereign allowing or adopting does not arise. Moreover, the notion of an implied or tacit command is suspect. An implied command seems not to be a command at all. It is better to accept the possibility of laws which are not commanded by the present sovereign and to give up the notion of command and adopt the analogy of the rule of a religious order which can continue in force long after the death of its founder.

(4) The bulk of English law has been created neither by ordinary nor by delegated legislation, but by the decisions of the courts. The argument of Austin is that judges are the delegates of Parliament which has conferred upon them law-making powers. It is true that judges are appointed in England by a Government answerable to Parliament and there are parliamentary procedures for their removal, but to describe the judges as delegates is wholly misleading. The fact that Parliament can always overrule any judicial decision of the courts does not entail that judicial law-making is of a delegated nature. This would confuse subordinate powers with derivative powers.

(5) There are laws which are not commands, e.g., declaratory statutes, repealing statutes and "laws of imperfect obligation" which include laws defining what a contract is, what a crime is or a law which lays down that no action shall succeed after the lapse of the limitation period. Austin treated them as

exceptions Buckland points out that declaratory statutes could have been treated as repeating earlier commands, while repealing statutes may be said to create fresh claims and duties by their cancellation of earlier ones and hence can be called command. However, this view is not accepted by Prof. Dias.

(6) Prof. Dias raises the question whether a determinate person or body of persons can be discovered who might be regarded as having commanded the whole corpus of the law. His answer is that such a person or a group of persons was not discoverable at any point in history. It is not possible to say who commanded the rule that precedents shall be binding. A sovereign is a sovereign within a State which is a legally defined organisation consisting of territory, population, government and a measure of independence in external relations. It is not possible to say who commanded those requirements. It might be thought that the present monarch and members of both Houses of Parliament can command any law they please. However, Prof. Olivercrona points out that the individuals who comprise the sovereign body have attained their positions by virtue of the rule of law. The question is who commanded those rules. Whoever commanded them in turn owed their authority to command to the observance of those rules. There is no sense in saying that the rules which brought them to their positions were their own commands. Even if the Crown in Parliament is taken as the uncommanded commander, a study of the events of 1688-89 shows that this body in no sense commanded the rule that its command shall be law. It was the acceptance of it as the supreme commander, particularly by the judges, that entitled it to command henceforth. It is artificial to pretend that any member of Parliament believes that the law of the land has emanated from his commands. The fact is that the vast majority of the laws existed before he was born. To attribute commands to people who neither commanded nor believe that they had commanded, is a fantasy. Although the Crown in Parliament was accepted in 1689 as the Austinian commander, the bulk of the common law and much legislation was already in existence and continued to exist unaffected. Even if it is assumed that those laws had emanated from earlier commands, the question is why and how

the commands of a former sovereign continue to be laws under his successor. Austin's reply was that this comes about by virtue of "tacit command" which means what the sovereign permits, he commands. This implies that the sovereign knows of the earlier commands and decides not to interfere with them. Prof. Hart has demolished the whole idea of "tacit command". Tacit command fails to explain why the laws and systems which continue are the same laws and systems. Prof. Dias concludes that if tacit command is rejected, as it must be, what remains is the proposition that laws remain in force until repealed.

(7) Even the actual commands of a sovereign acquire the character of laws when certain procedures have been followed and not otherwise. Even if the Queen and the members of the House of Lords and the House of Commons unanimously assent to a measure at a garden party in the Buckingham Palace, it would not become a law as the appropriate parliamentary procedures have not been observed. If these procedures are laws, they cannot be called command. If they are not laws, they are indistinguishable from the dictates of etiquettes and morals. This shows the inadequacy of the view that law is a command. The view that law is a command of the sovereign suggests as if the sovereign is standing just above and apart from the community giving his arbitrary commands. This view treats law as artificial and ignores its character of spontaneous growth. The sovereign is an integral part of the community or State and his commands are the commands of the organised community. Most of the theories regarding State in modern times say that sovereignty does not remain in the shape in which it was conceived by the writers in the past. The State itself is sovereign and law is nothing but the general will of the people. That means that law cannot be a command.

The view of Austin is that it is the sanction alone which induces men to obey law. This is not a correct view. According to Lord Bryce, the motives which induce a man to obey law are, indolence, deference, sympathy, fear and reason. The power of the State is the *ratio ultima*. Force is the last resort to secure obedience.

Critics point out that law is not an arbitrary command as conceived by Austin but a growth of an organic nature. Dr. J. Brown points out that even the most despotic of legislators cannot think or act without availing himself of the spirit of his race and time. Moreover, law has not grown as a result of blind force but has developed consciously and has been directed towards a definite end.

Austin put international law under positive morality and not law as it lacked the main ingredient of sanction. However, nobody will accept the view that international law is not law. The definition of Austin excludes a very important branch of law.

In the opinion of Duguit the notion of command is not applicable to modern social legislation which binds the State itself rather than the individual. This view is also accepted by the Supreme Court of India.

Laski and Dewey point out that political affairs are actually in the hands of certain officials who were placed there by various means but who always represent a combination of personal and group interests. As all the powers of government are in the hands of individual persons and are exercised by them, the idea of State has no reality apart from the institutions of government. Far from originating from on high, the powers of government are erected by men to serve human purposes and are valuable only as long as they do so. Considered in relation to society as a whole, there is an association of the people of a given society organised for political purposes. If this view of the State is accepted, the State is an agent of society to promote social welfare and the question of law as a command does not arise.

*Sovereignty.*—The sovereign is defined by Austin thus: "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society (including the superior) is a society political and independent." The sovereign may be an individual or a body or aggregate of individuals.

Sovereignty has a positive mark and a negative mark. The former is that a determinate human superior should "receive



habitual obedience from the bulk of a given society" and the latter is that that superior is "not in the habit of obedience to a like superior".

It is contended that Austin confused that *de facto* sovereign or the body that receives obedience, with the *de jure* sovereign or the law-making body. In Britain, the Crown receives allegiance from its subjects but the Crown in Parliament is the supreme law-maker. When Austin referred to the uncommanded commander who makes laws, he was referring to the *de jure* sovereign. The "negative mark" is not so much the concern of municipal lawyers as of international lawyers. For the municipal lawyers, the question is whose enactments constitute "laws". It is a matter of indifference to them that the law-maker obeys some other body in the international sphere. It has been questioned whether it is necessary to have a sovereign in a State. The answer depends upon the meaning of "necessary" and of "State". A sovereign may be "necessary" because definition has made it so. In another sense, the question is whether a sovereign is "necessary" as a practical matter. As regards the State, there is no need for only one law-making body, though in practice that is convenient.

According to Austin, the sovereign must be illimitable, indivisible and continuous. As regards illimitability, Austin denied that his sovereign could be limited. Substantial areas of constitutional law did not consist of laws but of positive morality. The sovereign cannot be under a duty as he cannot command himself. To be under a duty implies that there is another sovereign who commands the duty and imposes a sanction. Jethro Brown maintains that the sovereign can be bound by a duty but that is denied by Buckland. The view of Prof. Dias is that Austin overlooked limitations through disabilities rather than duty. The exercise of sovereign powers may be limited by special procedures. Bentham has shown how sovereignty may be divided in such a way that each component has a limited power to prescribe for the other. The view of Austin was that a sovereign can have no claim as a claim has to be conferred by a sovereign on someone. To say that one sovereign confers a claim on another is to deny the sovereignty of the latter. The Crown-in-Parliament is the sovereign in the Austinian sense and not the Crown alone. According to Austin,

another attribute of sovereignty is indivisibility. Bentham has shown how sovereignty could be divided. There are also examples of divided sovereignty, e g., the old Roman assemblies, the United States of America and the concurrent powers of a colonial legislature and the British Parliament.

Another attribute of Austinian sovereignty is continuity. The question is asked where sovereignty resides during a dissolution of Parliament. The view of Austin was that sovereignty lies with the Queen, the members of the House of Lords and the electorate. This is contrary to another view of Austin that sovereignty lies with the Queen, the House of Lords and the House of Commons. The question is who in this case is the commander and the commanded.

Lord Bryce found in Austin's definition of sovereignty a confusion between the notions of unlimited power of final authority which, even in the case of the United Kingdom to which his analysis was best suited, obscured the essential features. About Austin's view of law and sovereignty, Buckland writes: "This, at first sight, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law." As it is put, the statement is undoubtedly circular. Law is defined in terms of the sovereign and the sovereign is defined in terms of law. However, Austin did not do so. He defined law in terms of the sovereign, but he defined the sovereign as the body that receives habitual obedience from the bulk of a given society and that obviously was not circular. We should not accuse Buckland of having misrepresented Austin because what he said was that superficially Austin's argument looked circular. Buckland himself observed: "But, this is not circular reasoning, it is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference."

The expression obedience often suggests deference to authority and not merely compliance with orders backed by threats. The idea of obedience in fact fails in two different ways to account for the continuity to be observed in every normal legal system when one legislator succeeds another. An illustration of this kind is the change in law of incest made in Rome by the then Emperor

Claudius for his own private purposes. In order to marry Agrip-pina, the daughter of his brother, he procured a change in the law which permitted a marriage between an uncle and a niece or aunt and nephew so that they did not remain incestuous. Moreover, habitual obedience to the old law-giver cannot by itself render probable that the new legislator's orders will be obeyed. If there is to be this right and this assumption at the moment of succession during the reign of the earlier legislator, there must have been the acceptance of the rule under which the new legislator is entitled to succeed.

*Notion of sovereignty as understood in India.*—The Constitution of India provides for three different entities viz., the Union, the States and the Union Territories. It also creates three major instruments of power viz., the legislature, the executive and the judiciary. It also demarcates their separate jurisdictions minutely and expects them to exercise their powers without overstepping their limits. In short, the scope of the powers and the manner of their exercise are regulated by law. The result is that no authority created under the Constitution is supreme. It is the Constitution that is supreme and all authorities function under this supreme law of the land. In a federation like India the powers are so divided that a particular reform may be carried out only through the cooperation of the Union of India and the States. There may be some powers which cannot be achieved even by their cooperation. Sovereignty in the Austinian sense is not to be found in India. Sovereignty in India is not unlimited, illimitable and indivisible. It could not be otherwise as India has a federal Constitution.

It is true that the Directive Principles of State Policy cannot be enforced in a court of law, but they are nevertheless fundamental in the governance of the country. Even if they are not justiciable, they occupy a place of prominence in the hierarchy of Indian jurisprudence by laying down the governing norms of Indian society. No government can ignore them. Even the Supreme Court has to take them into consideration while interpreting the validity of the fundamental rights. They lay down the direction in which the government of the country is to be carried and also the limitations on their exercise.

*Contribution of Austin* —No impartial observer can deny the great contribution made by Austin to the study of jurisprudence.

English jurisprudence has been and still is predominantly analytical in character and other influences are merely secondary. It is true that there is little originality in Austin and he was inspired above all by Bentham from whom he inherited hatred of mysticism and unreality and a passion for classification, legislation and codification. It is also true that the main doctrines of Austin can be identified in his predecessors. His definitions of law, sovereign and political society can be found in the works of Hobbes and Bentham. However, the achievement of Austin lay in the fact that he was able to segregate those doctrines from the political and philosophical discussions in which they were embedded. He also restated them with a new firmness, grasp of detail and precision. Both lawyers and political thinkers could not only understand them but also use them to dispel the haze which still blurred the distinction between law, morality and religion and obstructed a rational criticism of legal institutions. Likewise, it was Austin who first demonstrated to English lawyers in their own idiom how the understanding even of unsystematised English law, with its forest of details, could be increased and its exposition improved by the use of a theoretical structure and precise analysis.

The view of Hart is that even the defects of Austin's theory have been a source of further enlightenment on the subject. To quote him: "But the demonstration of precisely where and why he is wrong has proved to be a constant source of illumination; for his errors are often the misstatement of truths of central importance for the understanding of law and society." Olivecrona acknowledges him as the pioneer of the modern positivist approach to law.

Austin was intimate with great thinkers and philosophers of his time like Bentham and J.S. Mill and he was praised by Mill. Austin removed many false notions which had obscured the true meaning of law and legal terms. His stand was to expel from the mind all ethical notions while considering the nature of positive law. He gave a death-blow to the theory of natural law. The view of Sir Henry Maine was that "no conception of law and society has ever removed such a mass of undoubted delusions" as was done by Austin and "his works are indispensable, if for no other object, for the purpose of clearing the head."

The influence of the Austinian theory of law was great due to its simplicity, consistency and clarity of exposition. Gray writes: "If Austin went too far in considering the law as always proceeding from the State, he conferred a great benefit on jurisprudence by bringing out clearly that the law is at the mercy of the State." Prof. Allen observes: "For a systematic exposition of the methods of English jurisprudence, we will have to turn to Austin."

Hart points out that from Austin has descended a line of English analytical jurists. Amos, Markby, Hearne, Holland and Salmond did not differ from Austin in their conception and arrangement of the subject even when they opposed his doctrines. Although his influence was less direct in the United States, yet the same could be seen in *Nature and Sources of Law* by Gray. There is a lot in common between the views of Austin and Kelsen. The students of jurisprudence are very much indebted to Austin.

Austin's command theory of law became the starting point for subsequent analytical theories of great importance. Holland accepted the command theory in principle but substituted enforcement for the command of the sovereign. According to him, law is a general rule of human action enforced by a determinate authority. About Austin's contribution to analytical jurisprudence, Gray says that it was "the recognition of the truth that the law of State or another organised body, is not ideal but something which actually exists. It is not that which is in accordance with religion or nature or morality, it is not that which it ought to be, but that which it is".

*Bentham and Austin*:—Prof. Dias has attempted a comparison of Bentham and Austin and comes to the conclusion that the former provided a deeper and more adaptable theory than the latter. His concept of sovereignty was flexible as it avoided the shackles of indivisibility and illimitability. He was able to accommodate the division of authority between organs as in a federation, or division in certain areas as well as restrictions of authority and self-bindingness. His concept of law was broader than that of Austin and he avoided the absurdity of "law properly so-called". His sanction was both wider and less important than that of Austin. Laws are laws even though they are supported by moral or religious sanctions. They may be accompanied even by rewards. He had no

needed to resort to "sanction by nullity". The imperative foundation was a weakness in his theory but it was so much broader and less uncompromising than that of Austin that he was able to accommodate permissions up to a point. He avoided the fiction of "tacit command" (*Jurisprudence*, p. 479).

*Neo-Austinian School*: The chief defect in the conclusions of the Analytical School lay in ignoring the social aspects of law and its ethical basis and emphasizing the capacity for its coercive enforcement and its enunciation by the sovereign political authority. While the Historical School regards custom as the very type of law, the Austinians denied entirely the claim of customary law to be recognised as law in the strict sense of the term. International law, the existence and binding force of which Grotius took great pains to establish, is relegated by the Austinians to the category of positive morality.

In *Civilisation and the Growth of Law*, Prof. Robson deplors the fact that "English legal thought since Bentham has run in narrow grooves, remaining crabbed and practical in the worst sense of the word, unimaginative and devoid of any philosophical, ethical or sociological background. It is scarcely too much to say that jurisprudence hardly exists in Great Britain." Philosophy and law are barely on speaking terms, while sociology and law are strangers who have never even met" (p. 254).

The Neo-Austinian School is responsive to the criticisms by other schools of juristic thought. Jethrow Brown has recast the Austinian definition of law in these words: "Law is an expression of the general will affirming an order which will be enforced by the organised might of the State and directed to the realisation of some real or imaginary good" (*Austinian Theory of Law*, p. 354). The admission that law is not a mere command of the sovereign and that it proceeds from the general will coupled with the recognition of the fact that law discharges a social function by the "realisation of some good", shows an unmistakable attempt to supply the missing ethical element in Austin's concept of law. Sir John Salmond recognises customary law as a legal material source of law and hence entitled to be regarded as law in the strict sense of the term. In the opinion of Salmond, International Law is not mere positive morality but a species of Conventional Law.

While the English jurists of the Analytical School are appreciating the importance of the ethical aspects of law, continental jurists are realising that coercive force is also an essential element in the concept of law. Ihering writes: "A legal rule without coercion is a fire which does not burn, a light that does not shine." (*Law as Means to an End*, p. 241). Ihering considers international law as an incomplete form of law.

*H. L. A. Hart (1907)*

Prof. Hart is regarded as the leading contemporary representative of British positivism. His influential book, *The Concept of Law*, was published in 1961 and that shows that he is a linguistic, philosopher, barrister and a jurist.

Prof. Hart approaches his concept of law in this way. According to him: "Where there is law, there human conduct is made in some sense non-optional or obligatory." Thus the idea of obligation is at the core of a rule. He commences in his book by criticising Austin's view of law as a command. The idea of command explains a coercive order addressed to another in special circumstances but not why a statute applies generally and also to its framers. Moreover, there are other varieties of laws, notably powers. The continuance of pre-existing laws cannot be explained on the basis of command. Hart demolished the myth of "tacit command". Austin's "habit of obedience" fails to explain succession to sovereignty because it fails to take account of the important differences between "habit" and "rule". Habits only require common behaviour which is not enough for a rule. A rule has an "internal aspect" which people use as a standard by which to judge and condemn deviations. Habits do not function in this way. Succession to sovereignty occurs by virtue of the acceptance of a rule entitling the successor to succeed and not because of a habit of obedience.

The view of Prof. Hart is that the significance of rules has been neglected. He uses "rule" to distinguish between "being obliged" and "having an obligation". A gunman orders *B* to hand over his money and threatens to shoot him if he does not do so. In this case, *B* is obliged to hand over the money but he has no obligation to do so. *B* believed that some harm or other unpleasant consequences would befall him if he did not hand over

the money to the gunman and he handed over the money to avoid those consequences. The statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done. However, the statement that someone *had an obligation* to do something is of a very different type. In the case of the gunman there was no obligation as such. The statement that someone was obliged to do something normally carries the implication that he actually did it. One has an obligation only by virtue of a rule.

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin. There may be no centrally organised system of punishments for the breach of those rules. The social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals' respect for the rule violated. It may depend heavily on the operation of feelings of shame, remorse and guilt. When the pressure is of the last-mentioned kind, we may classify the rules as a part of the morality of the social groups and the obligation under the rules as a moral obligation. When physical sanctions are prominent or usual among the forms of pressure, even though those are neither closely defined nor administered by officials but are left to the community at large, we can classify those rules as a primitive or rudimentary form of law. We may find both types of serious social pressure behind the same rule of conduct. Sometimes this may occur with no indication that one of them is appropriate as primary and the other secondary. The question whether we are confronted with a rule of morality or rudimentary law, is not easy to answer. The insistence on importance or seriousness of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.

Two other characteristics of obligation go naturally together with this primary one. The rules supported by serious social pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. Rules so obviously essential as those which restrict



the free use of violence are thought of in terms of obligation. Rules which require honesty or truth require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group are either obligation or duty. The conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence, obligations and duties involve sacrifice or renunciation. There is always the possibility of a conflict between obligation or duty on the one hand and interest on the other. The figure of a bond binding the person obligated, which is buried in the word obligation, and the similar notion of a debt latent in the word duty are explicable in terms of these three factors which distinguish rules of obligation or duty from other rules. In this figure, the social pressure appears as a chain binding those who have obligations so that they are not free to do what they want to do. The other end of the chain is sometimes held by the group or their official representatives who insist on performance or exact the penalty. Sometimes it is entrusted by the group to a private individual who may choose whether or not to insist on performance or its equivalent in value to him. The first situation typifies the duties or obligations of criminal law and the second those of civil law where we think of private individuals having rights co-relative to obligations.

### *Primary and Secondary Rules :*

Prof. Hart makes a distinction between basic or primary rules and secondary rules. Under primary rules, human beings are required to do or abstain from certain actions whether they wish or not. Secondary rules are in a sense parasitic upon or secondary to primary rights. They provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old rules, or in various ways determine their incidence or control their operations. Primary rules impose duties. Secondary rules confer powers, public or private. Primary rules concern actions involving physical movement or changes. Secondary rules provide for operations which lead not merely to physical movement or change but to the creation or variation of duties or obligations. The union of primary and secondary rules results in law.

According to Prof. Hart, it is possible to imagine a society

without a legislature, courts or officials of any kind. There are many studies of primitive communities which depict in detail the life of a society where the only means of social control is the general attitude of the group towards its own standard modes of behaviour in terms of the rules of obligation. A social structure of this kind is often referred to as one of custom but Hart prefers to refer to such a social structure as one of *primary rules of obligation*. If a society is to live by such primary rules alone, there are certain conditions which must be satisfied. The first condition is that the rules must contain in some form restrictions on the free use of violence, theft and deception to which human beings are tempted but which they must repress if they have to live together. Such rules are in fact always found in primitive societies of which we have knowledge, together with a variety of others imposing on individuals various positive duties to perform services or make contributions to the common life. The second condition is that though such a society may exhibit the tension between those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform, the latter cannot be more than a minority. Only a small community closely knit by ties of kinship, common consent and belief and placed in a stable environment could live successfully by such a regime of unofficial rules. In any other conditions, such a simple form of social control must prove defective and will require supplementation in different ways

*Defects in Primary Rules:* Prof Hart refers to three defects

(1) The first defect in the simple social structure of primary rules is *uncertainty*. The rules by which the group lives will not form a system but will simply be a set of separate standards, without any identifying or common mark. They will resemble our own rules of etiquette. If doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling them, either by reference to an authoritative text or to an official whose declarations on that point are authoritative. Such a procedure and acknowledgment of either authoritative text or persons involved the existence of certain rules which do not exist and hence the uncertainty.

(2) The second defect is the *static character of the primary rules*. The only mode of change in the rules known to such a society

will be the slow process of growth, whereby courses of conduct once thought optional, become first habitual or usual and then obligatory, or when deviations once severely dealt with, are first tolerated and then passed unnoticed. In such a society, there will be no means of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones. The possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives. In an extreme case, the rules may be static in a more drastic sense. In this extreme case there will be no way of deliberately changing the general rules and the obligations which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual. Each individual would simply have fixed obligations or duties to do or abstain from doing certain things. If there are only primary rules of obligation, they would have no power to release those bound from performance or to transfer to others the benefits which would accrue from performance. For such operations of release or transfer or change in the initial positions of individuals under the primary rules of obligation, there must be rules of a sort different from the primary rules and those did not exist.

(3) The third defect of the simple form of social life is *inefficiency*. Disputes as to whether an admitted rule has or has not been violated, will always occur and will, except in the smallest societies, continue interminably if there is no agency specially empowered to ascertain finally and authoritatively the fact of violation. Punishments for violations of rules are not administered by a special agency but are left to the individuals affected or to the group at large. The waste of time involved in the group's unorganised efforts to catch and punish offenders and the smouldering vendettas which may result from self-help in the absence of an official monopoly of sanctions, may be serious.

*Remedies for Defects.*—According to Hart, the remedy for each of the three main defects in the simplest form of social structure consists in supplementing the primary rules of obligation with secondary rules, which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the

pre-legal into the legal world. As each remedy brings with it many elements that permeate law, all three remedies together are enough to convert the regime of primary rules into a *legal system*. *Law is a union of primary rules of obligation with secondary rules*. Though the remedy consists in the introduction of rules which are certainly different from each other as well as from the primary rules of obligation which they supplement, they have important features in common and are connected in various ways. They may all be said to be on a different level from the primary rules as they are all about such rules. While primary rules are concerned with the actions which the individuals must or must not do, secondary rules are concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined.

(1) The simplest form or remedy for the uncertainty of the regime of primary rules is the *introduction of a "rule of recognition"* which may take any of a huge variety of forms, simple or complex. It may be no more than an authoritative list or text of the rules found in a written document or carved on some public monument. This step from pre-legal to legal may be accomplished by the reduction to writing of hitherto unwritten rules. Where there is such an acknowledgment, there is a very simple form of secondary rule for conclusive identification of the primary rules of obligation.

In a developed legal system, the rules of recognition are of course more complex. Instead of identifying rules exclusively by reference to a text or list, they do so by reference to some general characteristic possessed by primary rules.

(2) The remedy for the static quality of the regime of primary rules consists in the *introduction of "rules of change"*. The simplest form of such rule empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it and to eliminate old rules. It is in terms of such a rule that the ideas of legislative enactment and repeal are to be understood. Such rules of change may be very simple or very complex. The powers conferred may be unrestricted or limited in many ways. The rules may

define in more or less rigid terms the procedure to be followed in legislation. There will be a very close connection between the rules of change and rules of recognition. Usually some official certificate or official copy will be taken as a sufficient proof of due enactment. If there is a social structure so simple that the only source of law is legislation, the rule of recognition will simply specify enactment as the unique mark or criterion of validity of the rules.

(3) The defect of inefficiency will be remedied by secondary rules empowering individuals to make authoritative determination of the question whether, on a particular occasion, a primary rule has been broken or not. Those are called "*rules of adjudication*". Besides identifying the individuals who are to adjudicate, those rules will also define the procedure to be followed. Like other secondary rules, these are on a different level from the primary rules. Though reinforced by further rules imposing duties on judges to adjudicate, they do not impose duties but confer judicial powers and a special status on judicial declarations about the breach of obligations. These rules define a group of important legal concepts of judge or court, jurisdiction and judgment. Rules of adjudication have intimate connection with other secondary rules. The rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and those judgments will become a source of law. (*The Concept of Law*, pp. 89-95).

In a few legal systems, judicial powers are confined to the authoritative determination of the fact of violation of the primary rules. Most systems have seen the advantages of further centralisation of social pressure and partially prohibited the use of physical punishments or violent self-help by private individuals. They have supplemented the primary rules of obligation by further secondary rules by which penalties for violation have been limited and exclusive power has been given to the judges to direct the application of penalties by other officials. *If we consider the structure which results from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, we have the heart of a legal system.*

*The Legal System.*—The legal system of Hart is explained by

Lord Lloyd in this manner. In place of Austin's monolithic model, Hart suggests a dual system consisting of two types of rules which he describes as primary and secondary rules. Primary rules lay down standards of behaviour and are rules of obligation which impose duties. Secondary rules are ancillary to and concern the primary rules in various ways. They specify the ways in which primary rules may be ascertained, introduced, eliminated or varied and the mode in which their violation may be conclusively determined. Secondary rules are mainly procedural and remedial and include not only the rules governing sanctions but also go far beyond them. They extend to the rules of judicial procedure and evidence and the rules governing the procedure for new legislation. It is conceivable that a society might have a legal system consisting solely of primary rules but as a society develops and becomes more complex, the need for secondary rules will inevitably become manifest and those will grow in complexity with the further development of society. The view of Hart is that a society which is legally so undeveloped as to have no secondary rules but only primary rules of obligation, would not really possess a legal system at all but a mere set of rules. The view of Hart is that it is the union of primary and secondary rules which constitutes the core of a legal system. It is only in this condition that we may speak of officials. It is in the relationship of citizens and officials to primary and secondary rules that Prof. Hart finds his criteria for the existence of a legal system.

*"Internal Aspect" of Law.*—Hart refers to the "internal aspect" or "inner point of view" that human beings take towards the rules of a legal system. According to him, law depends not only on the external social pressures which are brought to bear on human beings to prevent them from deviating from the rules but also on the inner point of view that human beings take towards a rule imposing an obligation. In a society which has only primary rules, it is necessary for citizens not only generally to obey the primary rules but also consciously to view such rules as common standards of behaviour whose violations were to be criticised. In such a primitive society, an internal point of view on the part of the members of the society is necessary for the society to be held together in terms of obligation.

For a legal system to exist, there must be general obedience by citizens to the primary rules of obligation but it is not necessary for them to possess "an internal point of view". In such a case, the importance of the internal point of view relates to the officials of the system and not to citizens. Those officials must not merely obey the secondary rules but must take an inner view of those rules. This is a necessary condition for the existence of a legal system. Official compliance with secondary rules must involve both a conscious acceptance of those rules as standards of official behaviour and a conscious desire to comply with those standards. Whether this appropriate state of mind exists or not is a question of fact. Hart concedes that there will be a number of borderline cases such as governments in exile or countries subject to military occupation, but he insists that to establish the existence of a legal system in the full sense, the two types of rules and the view taken of the secondary rules by the officials are essential ingredients. (*Introduction to Jurisprudence*, pp. 189-91).

*Criticism.*—The view of Lord Lloyd is that Hart's description of a developed legal system in terms of a union of primary and secondary rules is undoubtedly of value as a tool of analysis of much that has puzzled both the jurists and the political theorists, but one may wonder whether too much is not being claimed for the new view of some of the old problems. Prof. Hart himself seems to recognise that his legal system is not necessarily as comprehensive as he appears to indicate since he suggests that there are other elements in a legal system, and in particular the "open texture" of legal rules as well as the relationship of law to morality and justice. Lord Lloyd asks the question whether it is possible to reduce all the rules of the legal system to rules which impose duties and to rules which confer powers. This is an oversimplification of a point. It can be said that many of the so-called rules of recognition do not so much confer power but specify criteria which are to be applied in particular cases, such as the rules of procedure and evidence. It is doubtful whether all the so-called secondary rules can properly be treated as a unified class. There seems little in common between a rule governing the formal validity of a will and a rule governing the traditional limitations of a legislature. Prof. Hart himself concedes that a "full detailed

taxonomy of the varieties of law still remains to be accomplished". (*Ibid.*, pp. 192-3).

Prof. Ronald Dworkin has criticised Hart for representing law as a system of rules and for suggesting that, at certain points, the judges use their discretion and play a legislative role. The view of Dworkin is that a conception of law as a system of rules fails to take account of what he calls "principles". He also maintains that judges do not have discretion as even in hard cases, there is only one "right answer". The contention of Dworkin is that principles are to be distinguished from rules in a number of ways. Principles such as the standard that no man may profit by his own wrong, differ from rules "in the character of the direction they give". While rules are applicable in an all or nothing fashion, principles state "a reason that argues in one direction but do not necessitate a particular decision... All that is meant when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant as a consideration inclining in one direction or another". Principles have a dimension of weight or importance which rules do not have.

Dworkin further contends that the positivist models of judicial process like that of Hart cannot accommodate principles and that makes them fall back on discretion. "We can no longer speak of the judge being bound by standards, but must speak rather of what standards he characteristically uses." This casts doubt on the positivist contention that law must be identified by some ultimate test of validity such as the rule of recognition. Though Hart accepts permissive as well as mandatory sources of law, it is hardly surprising that the use which judges make of principles cannot be explained by this rule of recognition. That rule gives us the capacity to identify a law and principles are standards which are to be considered as inclining in one direction or another. There is no reason why an ultimate test of validity should not be formulated by which rules and principles could be identified "In the absence of binding statute and governing precedent, courts must take into account principles to be found in legislation and the decisions of courts".

Eckhoff contends that what is binding and what forms a part



of a legal system are really two different questions. A legal system contains standards or "guidelines" which provide the judges with reasons or arguments which may or should be taken into account where the decision is to depend upon weighing of reason. Such guidelines are of various kinds, e.g., the maxims of equity, the concept of reasonableness, principles of the type that "no man may profit from his own wrong", canons of statutory interpretation, public policy and the principles governing the application of precedent.

Regarding Hart's view of the inner aspect of law, the view of Lord Lloyd is that it is difficult to avoid the feeling that here also there is some oversimplification. It is really not possible to identify the precise viewpoint which necessarily animates officials towards the secondary rules of recognition. Officials are human beings like others and are influenced by all the many conflicting and mixed motives which move humanity. It seems excessive to qualify the existence of a legal system on such a comparatively tenuous criterion as the exact mental attitude of officials towards their own legal system.

The attempt to reduce legal systems to nothing more than a congeries of rules, linked to society in which they operate solely by the fact that the primary rules are habitually obeyed and the secondary rules are recognised by the officials, seems to ignore certain of the sociological foundations of the legal systems without which the concept of law itself may be incapable of being fully grasped. One feature of a legal system which appears to be missing from Hart's analysis is the concept of an institution. The view of Llewellyn is that one of the most important features of a legal system is "the way the law-jobs" get done. It is not just the rules which reveal this but the institutional framework within which those rules operate. A legal system contains not only rules but also a mass of institutions such as the legal profession, a set of law courts, a judicial hierarchy, various types of law-making bodies, administrative officials divided between different ministries and so forth and the structure of the legal rules comprising the system.

Hart's view of the continuity of law cannot be explained purely in terms of a habit of obedience. It is doubtful whether

his attempt to explain this purely in terms of the acceptance of a rule of recognition by officials is sufficient. Max Weber, the German legal sociologist, points out that authority in human society may take one of three forms, viz., charismatic, traditional or legal. The word "charismatic" is used to refer to that peculiar form of personal ascendancy which individuals may acquire in a particular society and which confers an indisputable aura of legitimacy over all their acts. Such charisma may be associated with the founder of a dynasty, but after his death the question arises whether his legitimate authority will pass to his descendants who may not have any charismatic quality. If such legitimate authority is inherited, the original charisma may become "institutionalised" and so embodied in permanent institutions to be formed largely by traditional usages. A further stage may develop into "legal domination". The legitimate domination becomes impersonal and legalistic. The institutional character of authority largely displaces the personal one. In a modern democratic State an institutionalised legislature, administration and judiciary operate impersonally under the legal order to which is attached a monopoly of the legitimate use of force.

The view of Lord Lloyd is that this institutional view of the continuity of law provides a more objective criterion for the continuance or persistence of law in a State governed by legal domination than any attempt to scrutinise the particular psychological motivation of officials who operate the system. It is not practicable to qualify in purely general terms the exact type of motivation which is to be associated with the attitudes of officialdom. (*Ibid.*, pp. 193-7).

The view of Prof. Dias is that the system of a private club can exist only within and presupposes a legal system but Hart does not appear to give an adequate criterion for distinguishing between them. The difference lies in the nature of the institutions of which the theory of Hart takes no account. A club is an institution and so is law and legal system. It is at the institutional level that the distinction has to be found.

Prof. Dias further says that the distinction between a legal and a pre-legal state of affairs is not at all clear. If a rule of recognition is not essential to the validity of primary rules in

social systems that have not advanced, what precisely is the criterion? The view of Hart is that in these societies "we must wait and see whether a rule gets accepted as a rule or not" but Dias does not accept this view. He points to the difficulty of finding the rule of recognition *de novo*. (*Jurisprudence*, p. 482).

According to Hart, the rule of recognition is a secondary rule, but the view of Prof. Dias is that it looks more like the acceptance of a special kind of rule than a power. Moreover, there are some rules of recognition which are not powers such as those which indicate the criteria to be applied, *e.g.*, the rules of procedure. It is also suggested by Raz that the rule of recognition is not a power but a duty addressed to officials. (*Ibid.*, pp. 482-3).

Hart's concept is based on the distinction between rules creating duties and rules creating powers as a legal system is constituted by their union, but the view of Dias is that it is questionable whether such a sharp distinction can be drawn. The same rule can create a power plus a duty to exercise it, or a power plus a duty not to exercise it. Prof. Fuller gives the example of a situation where the same rule may confer power and duty, or power or duty according to the circumstances. (*Ibid.*, pp. 483-4).

According to Dias, Hart's avowed positivism in relation to his concept of law is open to criticism. Hart says that the acceptance of a rule of recognition rests on social facts, but he does not concern himself with the reasons why, or the circumstances in which, it comes to be accepted. Social and moral considerations may set limits on a rule of recognition at the time of acceptance. (*Ibid.*, p. 485).

According to Prof. Dias, there appears to be a greater separation between Hart's concept of law and his positivism than he ever alleges between law and morality. For the limited purpose of identifying laws, his concept seeks to accomplish more than is necessary. For the purpose of portraying law in a continuum, it does not go far enough. (*Ibid.*, p. 486).

## SUGGESTED READINGS

- Allen, C. K. : *Law in the Making*.
- Amos : *View of the Science of Jurisprudence*.
- Attwooll (Ed ) : *Perspectives in Jurisprudence*, 1977.
- Aus in, J. : *Lectures on Jurisprudence* (5th edition, R. Campbell).
- Austin, John : *Province of Jurisprudence Determined*.
- Bendix, Reinhard : *Max Weber: An Intellectual Portrait*, 1959.
- Bentham, J. : *A Fragment on Government*.
- Bentham, J. : *Of Laws in General* (Ed. H L A. Hart).
- Bentham, J. : *Principles of Morals and Legislation*.
- Bentham, Jeremy : *The Collected Works of Jeremy Bentham*, London, 1970.
- Bodenheimer, E. : *Jurisprudence*.
- Brown, Jethro : *The Austinian Theory of Law*.
- Bryce, J. : *Studies in History and Jurisprudence*, Oxford, 1901.
- Buckland, W. W. : *Some Reflections on Jurisprudence*, 1945.
- Burrow, J. W. : *Evolution and Society*, 1966.
- Clark : *Practical Jurisprudence*.
- Cohen, Felix S. : *The Legal Conscience*, 1960.
- Dias, R. W. M. : *Jurisprudence*, London, Butterworths, 1976.
- Dias and Hughes : *Jurisprudence*, 1957.
- Dworkin, Ronald : *Taking Rights Seriously*, 1977.
- Eastwood, R. A. and G.W. Keeton : *The Austiman Theories of Law*.
- Freeman, M D.A. : *The Legal Structure*, London, 1974.
- Friedmann, W. : *Legal Theory*, London, 1960.
- Fuller : *The Law in Quest of Itself*, 1940.
- Fuller : *The Morality of Law*, 1969.
- Goodhart, A L : *English Law and the Moral Law*.
- Gray, J. C : *The Nature and Sources of Law*, 1921.
- Hacker and Raz (Eds ) : *Law, Morality and Society*, 1977.
- Hagerstrom : *Inquiries into the Nature of Law and Morals*, 1953.
- Hall, J. : *Readings in Jurisprudence*.
- Hart, H. L. A. : *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford, 1983.
- Hart, H L A. : *The Concept of Law*, Oxford University Press, 1978.
- Hibbert : *Jurisprudence*.
- Holland, T. E. : *Elements of Jurisprudence*.
- Hostie : *Outlines of Jurisprudence*.
- James, M H. (Ed ) : *Bentham and Legal Theory*.
- Jones, J. W. : *Historical Introduction to the Theory of Law*.
- Kantorowicz : *The Definition of Law*, 1958.
- Kocourek : *Introduction to the Science of Law*.
- Lindley : *Introduction to the Study of Jurisprudence*.
- Lloyd, Lord : *Introduction to Jurisprudence*, London, Stevens & Sons, 1979.

- Lyons, D. B. : *In the Interests of the Governed: A Study in Bentham's Philosophy of Utility and Law*, 1973.
- MacCormick, N. : *H. L. A. Hart*, London, 1981.
- Markby : *Elements of Law*.
- Olivecrona, K. : *Law as Fact*, 1971.
- Osborne : *Jurisprudence*.
- Pollock, Frederick : *First Book of Jurisprudence*.
- Pound, R. : *Interpretations of Legal History*.
- Pound, R. : *Introduction to the Philosophy of Law*.
- Pound, R. : *Jurisprudence*, 1959
- Raz, J. : *The Authority of Law*, Oxford, 1979.
- Raz, J. • *The Concept of a Legal System*
- Sayre (Ed.) • *Interpretations of Modern Legal Philosophy*.
- Simpson (Ed ) : *Oxford Essays in Jurisprudence*, 1973.
- Stone, J. : *Legal System and Lawyers' Reasonings*, 1964.
- Stone, J. • *The Province and Function of Law*, 1950.
- Summers, R. S. (Ed.) : *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, 1971
- Unger, R. M. : *Law in Modern Society*, 1976.
- Weber, Max : *Law and Economy in Society*, 1954.
- Wright, Von : *Norm and Action*.

## XXIII

### PURE THEORY OF LAW

In the words of Prof. Dias, the pure theory of law of Hans Kelsen (1881-1973) represents a development in two different directions. It marks the most refined development to date of analytical positivism. It also marks a reaction against the welter of different approaches that characterised the opening of the 20th century. This does not mean that Kelsen reverted to ideology. As a matter of fact, he sought to expel ideologies of every description and present a picture of law, austere in its abstraction and severe in logic. (*Jurisprudence*, p. 488).

Kelsen started his theory from certain premises. According to him, a theory of law must deal with law as it is actually laid down and not as it ought to be. In this, he agreed with Austin and insistence on this point got him the title of "positivist". A theory of law must be distinguished from the law itself. Law consists of a mass of heterogeneous rules and the function of a theory of law is to organise them into a single, ordered pattern. Kelsen evolved his theory out of a profound study of the legal material actually available. What he did was to proffer it as a way of regarding the entire legal order and to demonstrate the pattern and shape into which it falls.

(According to Kelsen, a theory of law should be uniform. It should be applicable to all times and in all places. Kelsen advocated general jurisprudence. He arrived at generalisations which hold good over a very wide area.)

Kelsen writes that a theory of law must be free from ethics, politics, sociology, history etc. In other words, it must be pure. If a theory is to be general, it has to be shorn of all variable factors. It is true that Kelsen did not deny the value of ethics, politics, history, sociology etc. but his view was that a theory of law must keep clear of those considerations

The aim of a theory of law is to reduce chaos and multiplicity to unity. Legal theory is a science and not volition. It

is the knowledge of what the law is and not of what the law ought to be. Law is a normative and not a natural science. As a theory of norms, legal theory is not concerned with the effectiveness of legal norms. A theory of law is formal, a theory of the way of ordering, changing contents in a specific way. The relation of legal theory to a particular system of positive law is that of possible to actual law.

To Kelsen, knowledge of law is a knowledge of "norms". A norm is a proposition in hypothetical form: "If X happens, then Y should happen". The science of law consists of the examination of the nature and organisation of normative propositions. It includes all norms created in the process of applying some general norm to a specific action. According to Kelsen, a dynamic system is one in which fresh norms are constantly being created on the authority of an original, or basic norm which is named by him *Grundnorm*. A static system is one which is at rest and the basic norm determines the content of those derived from it in addition to imparting validity to them.

Kelsen drew a distinction between propositions of law and those of science. Propositions of science deal with what necessarily happens while propositions of law deal with what ought to happen. If A commits theft, the proposition of law is that he must be punished according to law of the country. Even if a person is not punished for committing an offence, that does not disprove the proposition. The proposition remains the same that if a person commits an offence, law demands that he must be punished. The legal propositions deal with what ought to be. To quote Kelsen: "The principle according to which natural science describes its object is casualty, the principle according to which the science of law describes its object is normativity."

According to Kelsen, the distinction between legal "oughts" and the other "oughts" is that the former is backed by force. To this extent, the views of Kelsen and Austin agree, but they differ in the elaboration of the idea. The view of Austin is that law is a command backed by a sanction. However, Kelsen rejects the idea of command as it introduces a psychological element into a theory which should be "pure". All that Kelsen is prepared to

concede is that law is a "depsychologized command, a command which does not imply a will in a psychological sense of the term". Another difference is that to Austin sanction is something outside the law which imparts validity to law. However, Kelsen maintains that the legal "ought" cannot be derived from any fact outside the law. The validity of any legal "ought" is derived from some other legal "ought". It was in this way that Kelsen was able to analyse the Austinian sanction into rules of law. The view of Austin is that if a person commits a theft, he is to be punished according to law and that is the sanction. The view of Kelsen is that the operation of the sanction itself depends on other rules of law. One rule says that if a man commits a theft, he should be arrested. Another rule says that after arrest, he should be brought for trial. These rules regulate his trial. Another rule says that if he is found guilty by jury, the judge should sentence him. Still another rule lays down that the sentence should be executed by certain officials. Thus, sanction itself dissolves into rules of law and the distinction between law and sanction disappears.

### The Basic Norm

The view of Kelsen is that in every legal system, no matter with what propositions of law we start, an hierarchy of "oughts" is traceable to some initial or fundamental "ought" from which all others emanate. This is called by him *Grundnorm* or the basic or fundamental norm. This norm may not be the same in every legal system, but it is always there. It is not necessary that there should be one fundamental law. Every rule of law derives its efficacy from some other rule standing behind it, but the *Grundnorm* has no rule behind it. The *Grundnorm* is the initial hypothesis upon which the whole system rests. We cannot account for the validity or the existence of the *Grundnorm* by pointing to another rule of law. The *Grundnorm* is the justification for the rest of the legal system. We cannot utilise the legal system or any part of it to justify the *Grundnorm*. A *Grundnorm* is said to be accepted when it has secured for itself a minimum of effectiveness. That happens when a certain number of persons are willing to abide by it. There must not be a total disregard of the *Grundnorm*, but there need not be universal adherence to it. All that is necessary is that it should command a minimum of support. When a *Grundnorm*



ceases to derive a minimum of support, it ceases to be the basis of the legal order and it is replaced by some other *Grundnorm* which obtains the support of the people. Such a change in the state of affairs amounts to a revolution.

Kelsen does not give any criterion by which the minimum of effectiveness is to be measured. It is contended that in whatever way the effectiveness is measured, Kelsen's theory ceases to be "pure". The effectiveness of the *Grundnorm* depends upon sociological factors which are excluded by Kelsen himself.

The *Grundnorm* is the starting point for the philosophy of Kelsen. The rest of the legal system is considered as broadening down in gradations from it and becoming progressively more and more detailed and specific. The entire process is one of gradual concentration of the basic norm and the focussing of the law to specific situations. It is a dynamic process. The application of a higher norm involves the creation of new lower norms. The application of the general norm by the judge to a particular situation involves a creative element in so far as the judge, by his decision, creates a specific norm addressed to one or other of the parties. The final stage is the carrying out of the compulsive act. In the application of the general norm, the judge may be left with a large amount of discretion or he may consciously have to choose between alternative interpretations which the norm permits. The application of a general norm may depend upon the act of the parties who may themselves come to some agreement.

### Implications of Pure Theory

Certain conclusions were drawn by Kelsen. There is no distinction between public and private law. That is due to the fact that all law emanates from the same *Grundnorm*. Both public and private laws are a part and parcel of a single process of concretisation.

Another conclusion is that the legal system is an ordering of human behaviour. The idea of duty is the essence of law. That is evident in the "ought" of every norm. The idea of a right is not essential. It is said to occur "if the putting into effect of the consequence of the disregard of legal rule is made dependent upon the will of the person who has an interest in the sanction of the

law being applied". The idea of right is merely a by-product of law. The idea of individual rights is not the foundation of criminal law today. Formerly, the machinery of law was set in motion by the injured person, but now the same is set in motion by the State. It is true that the idea of right is still the basis of the law of property, but it is possible that the same may be dispensed with in the future. The idea of "personality" is simply a step in the process of concretisation. By a "person" is meant a totality of rights and duties. Kelsen rejects the distinction between natural persons and juristic persons. Natural persons are biological entities and are outside the province of legal theory. The State is a system of human behaviour and an order of social compulsion. "La is also a normative ordering of human behaviour backed by force". Thus, the State and law are identical. It is not correct to say that law is the will of the State as both the State and law are identical. The State as person is simply the personification of law. According to Kelsen, legal dualism is nothing but a reflection of and substitute for theology with which it has substantial identity. To quote Kelsen: "When we have grasped, however, the unity of State and law, when we have seen that the law, the positive law (not justice), is precisely that compulsive order which is the State, we shall have acquired a realistic non-personificative, non-anthropomorphous view, which will demonstrate clearly the impossibility of justifying the State by the law, just as it is impossible to justify the law by the law, unless that term be used now in its positive sense, now in the sense of right law, justice. The attempt to justify law by law is vain, since every State is necessarily a legal State. Law, says positivism, is nothing but an order of human compulsion. The State is neither more nor less than the law, an object of the normative, juristic knowledge in its ideal aspect, that is, as a system of ideas, the subject matter of social psychology or sociology in its material aspect, that is, as a motivated and motivating physical act (force)."

As the State is nothing but a legal construction, there is no demarcation between physical and juristic persons. As law is a system of normative relations and uses personification merely as a technical device to constitute points of unification of legal norms, the distinction between natural and juristic persons is irrelevant. All legal personality is artificial and deduces its validity from

superior norm. According to Kelsen, the concept of person is merely a step in the process of concretisation and nothing else.

Once the hierarchic character of law is grasped, the distinction between law-making or legislation on one hand and execution or application of law on the other, has not the absolute character which the traditionalists attribute to it. The majority of the legal acts are at once legislative and judicial acts. With every such act, a norm of superior degree is put into execution and a norm of inferior degree set up. For example, the first form of the Constitution which is a law-making act of the highest degree, is the execution of the basic norm. Legislation which is the making of general norms, is the execution of the Constitution. Judicial decision and the administrative act by which individual norms are set up, are the execution of statute and the compulsive act is execution of the administrative order and the judicial decision. According to Kelsen, there is no difference between legislative, executive and judicial processes as they are all norm-creating agencies. For Kelsen, the distinction between substantive and procedural law is relative, procedure assuming greater significance. It is the organ and the process of concretisation that constitute the legal system.

The distinction between questions of law and fact becomes relative. The "facts" are a part of the condition contained in the "if  $X$ " part of the formula. "If  $X$ , then  $Y$  ought to happen". The application of a norm concretises every part of it. The finding of fact by a judge is not necessarily what actually happened but what he regards as having happened for the purpose of applying the particular norm.

The legal order is a normative structure which so operates as to culminate in the application of sanctions for certain forms of human behaviour. The idea of duty is of its essence. Kelsen made no specific allowance for powers. Liberty, in his view, "is an extra-legal phenomenon". It is the jural opposite of duty. Kelsen's stand reflects a wider issue between an "open" and a "close" concept of law. Liberty and duty are two sides of the same coin. Kelsen's theory is an open concept of law. Liberty may result from the fact that judges and legislators have not yet pronounced on the matter. It may result from a deliberate decision not to

interfere. It may result from a deliberate abolition of a pre-existing duty. Liberty in the first case lies outside law. Claim is only a by-product of law. Modern criminal law has for the most part discarded the ancient ideas of law being set in motion by the injured person. It is now being enforced directly by officials. The idea of individual claim is no longer the foundation of criminal law although it is still the basis of the law of property and contract etc.

The most significant feature of Kelsen's doctrine is that the State is viewed as a system of human behaviour and an order of compulsion. Law is a normative ordering of human behaviour backed by force which "makes the use of force a monopoly of the community". A State is constituted by territory, independent government, population and ability to enter into relations with other States and each of these requirements is legally determined. The conclusion is that State and law are identical but this does not mean that every legal order is automatically a State, e.g., orders in primitive communities. Only relatively centralised legal orders are States.

Kelsen also applied his theory to the system commonly known as "international law". His earliest work did not touch on this field. It was only after Verdross had started to adapt his approach to international law that Kelsen himself took interest in it. However, his theory, when applied to international law, revealed many limitations. The Pure Theory demands that a *Grundnorm* be discovered. However, if there are conflicting possibilities, his theory provides no guidance in choosing between them. What Kelsen said was that the *Grundnorm* should command a minimum of support. In the international sphere, there are two possible *Grundnormen*, the supremacy of each municipal system or the supremacy of international law. Every national legal order cannot recognise any norm superior to its own *Grundnorm*. The English legal order does not apply in France and the vice versa is also correct. However, the English legal order recognises the validity of the French legal order in France. If the only *Grundnorm* known to English law is its own, it follows that the English legal order regards the validity of the French legal order in France as being in some way a delegated normative order from the English *Grundnorm*.

The view of Prof. Dias is that the theory of pure law requires a *Grundnorm* for international order but that is not clear. It may be the principle of *pacta sunt servanda*, or "coercion of State against State ought to be exercised under the conditions and in the manner that conforms with the custom constituted by the actual behaviour of the States". Prof. Dias is of the view that with reference to international law, the *Grundnorm* is a pure supposition unlike that of municipal law. Assuming that a monist legal theory has to be offered to account for the present state of international society, one way of explaining the assertion of equality by States would be by hypothesising a norm superior to that of each national order from which equality might be said to derive. One can ask the question whether there is any *Grundnorm* which commands the necessary minimum of effectiveness demanded by Kelsen's theory. There is no answer to it. It is not easy to reconcile a monistic theory of the primacy of international law over municipal law in the face of the conflict between the two.

Kelsen says that sanctions of international law are war and reprisal, but nobody would agree to the proposition that war and reprisal are a sanction in the legal sense. International law has not completely outlawed war as an instrument of national policy. International organisations also have no tribunal to decide with a binding effect whether war is under a sanction or not. A number of wars have taken place not as sanction but in utter violation of international law. International law does not fit in the "pure theory of law" and it should be taken as a limitation of the theory. His arguments are based on natural law principles.

### Criticism

Lord Lloyd observes that Kelsen's analysis of the formal structure of law as a hierarchical system of norms and his emphasis on the dynamic character of this process are certainly illuminating and avoid some of the perplexities of the Austinian system. A legal system is not an abstract collection of bloodless categories but a living fabric in a constant state of movement. Kelsen himself recognises that to call the function of a judge as political does not deprive it of its legal quality. There is a great danger that if we take the watch to pieces and analyse each part separately, we shall never attain the overall picture which shows how it works.

The view of Lord Lloyd is that the basic norm is a very troublesome feature of Kelsen's system. We are not clear what sort of norm this really is, nor what it does, nor where we can find it. A part of the problem lies in Kelsen's own obliqueness. In his latest formulation, Kelsen tells us that it is not "positive", which means that it is not a norm of positive law created by a real act of will of a legal organ but is presupposed in juristic thinking. He maintains that it is "meta-legal". It is legal "if by this term we understand anything which has legally relevant function". As it enables anyone to interpret a command, permission or authorisation as an objectively valid legal norm, its legal functions are not in doubt, but we are told that it is purely formal, is a juristic value judgment and has a hypothetical character. It forms the keystone of the whole legal arch. It is at the top of the pyramid of norms of each legal order. Prof. Goodhart was doubtful of the value of an analysis which did not explain the existence of the basic norm on which the whole legal system was founded. The view of Lord Lloyd is that in the majority of cases, certainly where stable democracies such as the United Kingdom are in issue, the basic norm is needless reduplication. The conclusion of Lord Lloyd is that Kelsen is only useful to the legal scientists and not the judge and only in a residual case. The kingpin of the whole structure rests upon the shaky foundation of a loose concept. It may be asked whether in this respect Kelsen really furthers our understanding of the legal order.

Austin relegated international law to the realm of positive morality, contrary to the universally accepted usage of modern States and lawyers. Kelsen seeks to overcome this difficulty by demonstrating how State laws can be dovetailed into the international order of norms so as to form one monistic system. The contention of Hart is that there is no reason at all why we should insist that international law as a legal system must have a basic norm. Such an assertion really depends upon a false analogy with municipal law. International law may simply consist of a set of separate primary rules of obligation which are not united in this particular will. Insistence upon the need for a basic norm, within the context of such a system as modern international law, often leads to a rather empty repetition of the mere fact that society does observe certain standards as obligatory. Hart refers to the rather

empty rhetorical form of the so-called basic norm of international law to the effect that "States should behave as they have customarily behaved". This seems to be no more than an involved way of asserting the fact that there is a set of rules which are accepted by States as binding rules

About international law, Prof. Stone writes: "It is difficult to see what the pure theory of law can contribute to a system which it assumes to be law, but which it derives from a basic norm which it cannot find."

The quality of purity claimed by Kelsen for all norms dependent on the basic norm has been the subject of attack for a long period. Julius Stone writes: "Since that basic norm itself is obviously most impure, the very purity of the subsequent operations must reproduce that original impurity in the inferior norm; we are invited to forget the illegitimacy of the ancestor in admiration of the pure blue-blood of the progeny. Yet the genes are at work down to the lowliest progeny." (*The Province and Function of Law*, p. 105).

Lauterpacht, a follower of Kelsen, has questioned if the theory of hierarchy of legal norms does not imply a recognition of natural law principles, despite Kelsen's blatant warning of natural law ideology. Many natural law theories do not establish absolute ideals but affirm the principle of higher norm superior to positive law. As mankind becomes legally organised, natural law rules become positive norms of a higher order. The difference between Kelsen's theory and those of modern law theories disappears. Hagerstrom appears to have unfolded the natural law philosophy concealed in Kelsen's assumption of the unconditional authority of the supreme power.

About Kelsen's theory of pure law, C. K. Allen writes: "Without the examination not only of law but of the implications of law as a function of society, the 'pure' essence distilled by the jurist is a colourless, tasteless and un-nutritious fluid which soon evaporates. But because we apply a critical as well as an analytical method to the juridical order we do not on that account forget that the existing positive law still remains positive law, and must be administered as such. Kelsen, in his just anxiety to repudiate the muddled jurisprudence which has often confounded law with

ethics, does less than justice to some of the theories which he attacks." (*Law in the Making*, p 57).

The conclusion of many writers is that, notwithstanding the logical coherence of Kelsen's structure, he provided no guidance in the actual application of the law. He showed how, in the process of concretising the general norms, it may be necessary to make a choice either in decision or interpretation. The judge or the official concerned is already aware of that necessity and his need is for some guidance as to how he should make his choice. The answer is not to be found in the teachings of Kelsen. The view of Prof. Dias is that one should not level this point as a criticism against Kelsen who was most anxious to insist that he was not concerned with that aspect. To criticise him for not having done which he expressly disclaimed is not fair. He set out to achieve a limited objective of presenting a formal picture of the legal structure and what he set out to do, he actually did. To say that he should have aspired to do more is not a criticism of what he has done, but a criticism of his limited objective (P. 510).

A legal order is not merely the sum total of laws, but includes doctrines, principles and standards, all of which are accepted as "legal" and which operate by influencing the application of rules. Their validity is not traceable to the *Grundnorm* of the order. The question is whether those are to be lumped with values and banished from a theory of law even though they are admitted to be legal. Dias says that it is a grave weakness in the theory of Kelsen.

The view of Lord Lloyd is the relation of Kelsen's logic structure to the actual facts of particular States is not clear. Kelsen aimed at presenting necessary form divorced from content, but nevertheless his whole argument is clearly aimed at a structure which can be shown to fit the facts. Kelsen seems to imply the universality of the system, but much of it is not relevant to anything but an advanced political state. It is very hard to grasp exactly to what extent Kelsen admits the relevance of fact at all. He nowhere examines specifically the link between fact and law.

Kelsen tells us that even if racketeers enforce a "tax" on night clubs by coercion, that is not a legal norm. The reason



given by him is that a legal norm can be created by persons who are considered legal authorities under the Constitution. To be a legal norm, it must form a part of the official hierarchy of norms. Lord Lloyd asks the question whether it applies to bodies like trade associations which possess rules and sanctions which the legal hierarchy neither prohibits nor enforces. Those are presumably not legal norms, yet they not only resemble them closely but may be said to be lawful so far as the State does not prohibit them.

Prof. Laski once remarked that "granted its postulates, I believe the pure theory to be unanswerable, but . . . its substance is an exercise in logic not in life". (*Grammar of Politics*). The view of Lord Lloyd is that to some extent, there is truth in this dictum, but it certainly does less than justice to the impressive display of learning, searching analysis and striking insights ranging over the whole vast field of law covered by Kelsen's General Theory of Law and the State and the Pure Theory of Law. (*Introduction to Jurisprudence*, p. 304).

### **Contribution of Kelsen**

About the contribution of Kelsen to legal theory, Prof. Friedmann writes: "The merciless way in which Kelsen has uncovered the political ideology hidden in the theories which profess to state objective truth has had a very wholesome effect on the whole field of legal theory. Hardly a branch of it, whether natural law theories, theories of international law, of corporate personality, of public and private law has remained untouched. Even the bitterest opponents of the Vienna school have conceded that it has forced legal theory to reconsider its position". (*Legal Theory*, p. 237). Again, "the chief merit of Kelsen's pure theory would seem to lie in the elucidation of the relation between the initial hypothesis (which might less abstractly be described as the basic political faith of the community) and the totality of legal relations derived from it. The conception of the law as a dynamic process of concretisation is a very fruitful one, and it gives a logical justification to conclusion which Gray and American Realists on the one hand and continental exponents of the modern sociological theories on the other hand have reached from very different angles". (*Ibid.*, p. 239).

The view of Lord Lloyd is that it was the aim of Kelsen, in his Pure Theory of Law, to describe the essential structure of a legal system and thereby present what he argued was the only way legal science could describe the formal logic of such a system in an intelligible way. Despite the many valid criticisms of his theory, the basic theses underlying it, that legal rules are to be equated with norms and that a legal system is a collection of such norms interpreted as a non-contradictory field of meaning, appear to be basically sound. The most complete exposition of this approach has been given by Dr. J. W. Harris. (*Introduction to Jurisprudence*, p. 304).

The view of Paton is that Kelsen has made an original and striking contribution to jurisprudence. In 1832, Austin cleared away much deadwood and a century later, Kelsen, with critical acumen, exposed many fallacies. He further points out that "his impartiality in the conflicting social conflicts of today has led conservatives to call him a dangerous radical and the revolutionaries to dub him a reactionary". (*A Textbook of Jurisprudence*, p. 13).

Kelsen made an original, striking and valuable contribution to jurisprudence. He considerably influenced the modern legal thought. His views regarding right, personality, State and public and private law have received great support from various quarters. His theories suggest the necessity of the revaluation of the above concepts. With his scientific precision and mighty and unparalleled legal subtlety, Kelsen analysed the legal order in a very convincing way.

The great contribution of Kelsen was that he demonstrated the unity of the legal system as well as the mechanics of its operation and that was really a valuable contribution.

### **Kelsen and Bentham**

Prof. Dias has compared the views of Kelsen and Bentham. He points out that although Kelsen has been hailed as having provided the outstanding theory of the twentieth century from a positivist point of view, it has to be remembered that Bentham's *Of Laws in General* was published after Kelsen had made his contribution. There are some differences between the two. Kelsen

avoided the weakness of Bentham's imperative basis, but in some other respects, the analysis of Bentham is preferable to that of Kelsen. The most important of them is Kelsen's method of individuating a norm which minimises the regulatory function of law. Bentham took full account of the regulatory function and stated that one law prescribes behaviour and another prescribes a sanction. They are two different act-situations. Bentham kept them apart but Kelsen rolled them into one. Kelsen was also driven to the conclusion that laws are ultimately permissions to apply sanctions and "ought" includes "may" and "can" which Bentham had avoided. Bentham gave sanction a much broader meaning than Kelsen. However, both of them perceived that constitutional law is a part of every law as ordinarily formulated. The linkage for Bentham was that such laws are compounded of other laws enacted at other times and in other contexts. Kelsen traced the linkage to the *Grundnorm*. (P. 511).

### SUGGESTED READINGS

#### *Essays in Honour of Hans Kelsen*

- |                |   |
|----------------|---|
| Brown, Jethro  | <i>The Austrian Theory of Law</i> , 1906.   |
| Buckland       | <i>Reflections on Jurisprudence</i> , 1945.   |
| Dias, R. W. M. | • <i>Jurisprudence</i> , London, 1976.  |
| Ebenstein, W.  | : <i>The Pure Theory of Law</i> , 1945.   |
| Friedmann, W.  | • <i>Legal Theory</i> , London, 1960.   |
| Hall           | : <i>Readings in Jurisprudence</i> .  |
| Hart, H. L. A. | • <i>Essays in Jurisprudence and Philosophy</i> , Oxford, 1983.   |
| Hughes         | : <i>Law, Reason and Justice</i> , 1969.  |
| Jones, J. W.   | : <i>Historical Introduction to the Theory of Law</i> .   |
| Kantorowicz    | : <i>The Definition of Law</i> (ed. Campbell, 1958).  |
| Kelsen, H.     | : <i>General Theory of Law and State</i> (trans. A. Wedberg, Twentieth Century Legal Philosophy Series, I). |
| Kelsen, H.     | : <i>Pure Theory of Law</i> (trans. M. Knight).   |
| Kelsen, H.     | : <i>What is Justice?</i>   |
| Lloyd, Lord    | : <i>Introduction to Jurisprudence</i> , London, 1979.  |
| Pound, R.      | : <i>Jurisprudence</i> , 1959.  |
| Stone, J.      | : <i>Legal System and Lawyers' Reasonings</i> .   |
| Stone, J.      | : <i>The Province and Function of Law</i> , 1947.   |
| Summers        | : <i>Essays in Legal Philosophy</i> .   |

## XXIV

### HISTORICAL SCHOOL OF LAW

In the words of Salmond: "That branch of legal philosophy which is termed historical jurisprudence is the general portion of legal history. It bears the same relation to legal history at large as analytical jurisprudence bears to the systematic exposition of the legal system. It deals, in the first place, with the general principles governing the origin and development of law, and with the influences that affect the law. It deals, in the second place, with the origin and development of those legal conceptions and principles which are so essential in their nature as to deserve a place in the philosophy of law—the same conceptions and principles, that is to say, which are dealt with in another manner and from another point of view by analytical jurisprudence. Historical jurisprudence is the history of the first principles and conceptions of legal system." (*Jurisprudence*, 11th edition, pp. 5-6).

About the nature and functions of the Historical School of Law, G. G. Lee writes: "Historical Jurisprudence deals with law as it appears in its various forms at its several stages of development. It holds fast the thread which binds together the modern and the primitive conception of law, and seeks to trace through all the tangled mazes which separate the two, the line of connection between them. It takes up custom as enforced by the community and traces its development. It seeks to discover the first emergence of those legal conceptions which have become a part of the world's common store of law, to show the conditions that gave rise to them, to trace their spread and development, and to point out those conditions and influences which modified them in the varying course of their existence. But historical jurisprudence is not a mere branch of anthropology, except in so far as any science which deals with human life may be regarded as a department of these studies. It does not attempt to set forth all law and customs which may be found in ancient and modern savage tribes, as well as in civilized

nations of every clime. If such were its object, it would not be a science, nor would it be possible for it to be complete. It would be a mere collection of laws and customs having no necessary order or system. Its attainment or lack of perfection would depend upon the degree of completeness with which its collection had been made."

Prof. Dias points out that the Historical School arose more or less contemporaneously with the Analytical School at the beginning of the 19th century and should be regarded as a manifestation of the reaction against natural law theories. It did not emerge as something novel in European thought as it had been germinating long before then. The reaction against natural law theories provided a rich bed in which the seeds of historical scholarship took root and spread.

The Historical School was a reaction against *a priori* notion of natural philosophy. Natural law thinkers had thought of law which was always the same (unchangeable). They failed to see that law had grown and developed from the past. The natural law philosophers believed in ideal principles of law as revealed by reason and did not look to history, traditions, customs, habits and religions as true basis of law.

Historical approach to law derived its inspiration from the study of Roman law on the continent. Post Glossators commentators of Roman law attempted to relate Roman law to the problems of law. That accelerated the growth of many branches of law. The study of Roman law in this form was received in Germany in the 15th and 16th centuries. That contained the historical approach in its embryonic form.

### *Montesquieu*

According to Sir Henry Maine, Montesquieu was the first jurist who followed the historical method. He made researches into the institutions and laws of various societies and came to the conclusion that "laws are the creation of climate, local situations, accident or imposture". He did not go further and did not lay down any philosophy underlying the relation between law and society, but his suggestion that law should answer the needs of the time and place was a step in the direction of new thinking.

*Hugo*

The view of Hugo was that law, like language and manners of the people, forms itself and develops as suited to the circumstances. The essence of law is its acceptance, regulation and observance by the people.

*Burke*

Burke laughed at an attempt to deduce a constitution from abstract principles and pointed out that it could only be the result of a gradual and organic growth.

*Herder*

Herder rejected the universalising tendencies of the French philosophers and stressed the unique character of every historical period, civilisation and nation. According to him, every nation possesses its own individual character and qualities and none is intrinsically superior to others. Any attempt to bridge these innumerable manifestations under the general command of a universal natural law based on reason was inimical to the free development of each national spirit (*Volksgeist*) and could result in imposing a crippling uniformity. To Herder is principally due a new approach to history as the life of a community, rather than concerned with the exploits of kings, statesmen, generals and other so-called great men. The originality and influence of Herder was due to his belief that different cultures and societies develop their own values rooted in their own history, traditions and institutions and the quality of human life and its scope for self-expression resided in the plurality of values, each society being left free to develop in its own way.

The issue which caused the expounding of the thesis of Historical School was the problem of the codification of law in Germany which had arisen due to the political changes brought about by the Napoleonic Wars. During the period of French domination, the *Code Napoleon* remained in force in many parts of Germany. After the restoration of the national government, the problem of codification drew the attention of the people. Many jurists were in favour of promulgating a new code incorporating the best points from foreign laws as neither the old code nor the customary laws were adequate enough to fulfil and suit the present needs and

conditions of the people of Germany. The main supporter of codification was Thibaut (1771-1840), Heidelberg Professor who was inspired by the *Code Napoleon* and impressed by the movement for German national unification. He advocated the rationalisation and unification of the innumerable laws then ruling in different parts of Germany. He was opposed by Savigny who had knowledge of the defects of contemporary codes. His view was that a code was not a suitable instrument for the development of German law at that time. His contention was that law is a product of the lives of the people and a manifestation of their spirit. The source of law is the general consciousness of the people and cannot be borrowed from outside.

#### *F K Von Savigny (1779-1861)*

Savigny was born in Frankfurt in 1779. His interest in historical studies was kindled at the Universities of Marburg and Gottingen and greatly encouraged when he came into contact with the great Neibuhr (historian) at the University of Berlin. He also acquired a lasting veneration for Roman law. In 1803 appeared his first major work, *The Law of Possession*, in which he traced the process by which the original Roman doctrines of possession had developed into the doctrines and actions prevailing in contemporary Europe. He studied the development of Roman law in medieval Europe and published between 1815 and 1831 in six volumes *The History of Roman Law in the Middle Ages*. In *The System of Modern Law*, he analysed Roman and local laws. He was not opposed to reform but maintained that reforms which went against the stream of a nation's continuity were doomed. The essential prerequisite to the reform of German law was a deep knowledge of its history. Historical research was necessary for understanding and reform of the existing law. His warning was that legislators should look before they leap into reform.

Savigny is regarded as the founder of the Historical School on the continent. According to him, law is "a product of times the germ of which like the germ of State, exists in the nature of men as being made for society and which develops from this germ various forms, according to the envioning influences which play upon it" The essence of his thesis is to be found in his work of 1814 entitled *On The Vocation of Our Time for Legislation and*

*Jurisprudence.* To quote him: "In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence; they are but the peculiar faculties and tendencies of an individual people, inseparably united in nature and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. *Law grows with the growth and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.* Law is henceforth more artificial and complex, since it has a twofold life; as part of the aggregate existence of the community which it does not cease to be and secondly as a distinct branch of knowledge in the hands of the jurists.

"The sum, therefore, of this theory is that all law is originally formed in the manner in which, in ordinary but not quite correct language, customary law is said to have been formed, i. e., that it is first developed by custom and popular faith, next by jurisprudence—everywhere, therefore, by internal silently operating powers, not by the arbitrary will of a law-giver."

According to Savigny, the nature of any particular system of law was a reflection of the spirit of the people who evolved it. This was later characterised as the *Volksgeist* by Puchta, a disciple of Savigny. All law is the manifestation of this common consciousness. The broad principles of the system are to be found in the spirit of the people and they manifest themselves in customary rules. Law is a matter of unconscious growth. Any law-making should follow the course of historical development. Custom not only precedes legislation but is superior to it. Legislation should always conform to the popular consciousness. Law is not of universal application. It varies with peoples and ages. The *Volksgeist* cannot be criticised for being what it is. It is the standard by which laws, which are the conscious product of the



will as distinct from popular conviction, are to be judged. An individual jurist may misapprehend the popular conviction

Savigny rejected natural law. To him, a legal system was a part of the culture of a people. Law was not the result of an arbitrary act of a legislator but developed as a response to the impersonal powers to be found in the people's national spirit. This *Volksgeist* was "a unique, ultimate and often mystical reality" which was linked to the biological heritage of a people.

Law is the product of the *Volksgeist*, the national spirit or the genius of the people. It is not of universal application as each people develops its own legal habits according to its environment. Law is found and not made as it develops as a matter of unconscious and organic growth. Custom is the main source of law and it precedes legislation.

Savigny successfully used his *Volksgeist* theory to reject the French Code and the move to codify law in Germany. The result was that German law remained, until 1900, Roman law adapted to German conditions with the injection of certain local ideas. Savigny was not only a theorist but as a historian, he set himself the task of studying the course of the development of Roman law from ancient times till its existing state as the foundation of civil law of contemporary Europe. That led him to the hypothesis that all law originated in custom and only much later was created by juristic activity.

Savigny sees a nation and its state as organism which is born, matures and declines and dies. Law is a vital part of that organism. Law grows with the growth and strengthens with the strength of the people. It dies away as the nation loses its nationality. Nations and their law go through three developmental stages. At the outset of a nation, there is a "political" element of law. There are principles of law which are not found in legislation but are a part of "national convictions". These principles are "implicitly present in formal symbolic transactions which command the high respect of the population, form a grammar of the legal system of a young nation and constitute one of the system's major characteristics". In its middle period, law retains this "political" element to which is added the "technical" element of juristic skill. Thi

period is the apogee of a people's legal culture and is the time when codification is feasible. It is desirable so that the legal perfection of the period can be preserved for posterity. With the decline of a nation, law no longer has popular support and becomes the property of a clique of experts. In due course of time, even their skill decays. Ultimately, there is the loss of national identity.

*Criticism* : Prof. Dias has made certain observations on Savigny's idea of *Volksgeist*. According to him, there is undoubtedly an element of truth in it as there is a stream of continuity and tradition, but the difficulty lies in fixing it with precision. Savigny made too much of it and he drew sweeping inferences from modest premises. The whole idea of the *Volksgeist* certainly suited the mood of the German people. It was a time of the growing sense of nationhood and a desire for unification. The idea of *Volksgeist* is acceptable in a limited way but Savigny extrapolated it into a sweeping universal. He treated it as a discoverable thing but even in a small group, people hold different views on different issues and "the" spirit does not exist. It appears that the historical sense of Savigny deserted him as he adopted an *a priori* preconception.

Dias further points out that the transplanting of Roman law in the alien climate of Europe nearly a thousand years later is inconsistent with Savigny's idea of a *Volksgeist*. It postulates some quality in law other than popular consciousness. His effort to establish that the reception of Roman law had taken place so long ago as to make the Germanic *Volksgeist* an expression of it, was unconvincing. A survey of the contemporary scene shows that the German Civil Code has been adopted in Japan, the Swiss Code has been adopted in Turkey and the French Code in Egypt without violence to popular susceptibilities. The French Code was introduced into Holland during the Napoleonic era after displacing the Roman-Dutch common law and the Dutch law was never reintroduced again. The Dutch took Roman-Dutch law to their colonies in the Cape of Good Hope and Ceylon. The reception of English law in many parts of the world is evidence of supra-national adaptability and resilience.

Prof. Dias further points out that the *Volksgeist* theory minimises the influence which individuals, sometimes of alien race,

have exercised upon legal development. There are always men who by their superior genius are able to give legal development new direction. Ehrlich points out that customs are norms of conduct and juristic laws are norms for decision. They are always the creation of jurists.

Prof. Dias further points out that the influence of the *Volksgeist* is at the most a very limited one. The national character of law manifests itself more strongly in some branches than in others. This is more so in family law than in commercial or criminal law. The general reception of Roman law in Europe did not include Roman family law. The introduction of an alien legal system into India and Turkey affected least of all the indigenous family laws. Perhaps only family law and succession to some extent are really "personal" to a nation. In Turkey, new marriage laws contrary to the existing traditional laws, were introduced as a matter of deliberate policy. That shows that in modern times the function of the *Volksgeist* is that of modifying and adapting rather than creating. Even this function manifests itself only in the very "personal" branches of law. There is less evidence today of the creative force of the *Volksgeist* and none of its influence over the whole body of the law. The view of Dias is that today the *Volksgeist* is of little or no relevance as many existing laws have come from "outside". Savigny's theory of *Volksgeist* makes sense only to a limited extent in a continuum.

Dias further points out that law is sometimes used deliberately to change the existing ideas. It may also be used to further inter-State cooperation in many spheres. Bismarck, the Chancellor of Germany, introduced the Railway and Factories Accident Law, 1871 well before the social conditions were ripe and this he did with a view to weaken the socialist movement in Germany and not as demanded by the *Volksgeist*.

Dias maintains that many institutions have originated not in a *Volksgeist* but in the convenience of a ruling oligarchy. This applied to the institution of slavery. Many customs owe their origin to the force of imitation and not to any innate conviction of their righteousness. Some rules of customary law may not reflect the spirit of the whole population. That applies to legal customs. Some customs like the Law Merchant were cosmopolitan in origin

and were not the creatures of any particular nation or race. It is not clear at all who the *Volk* are whose *Geist* is said to determine the law.

Important rules of law sometimes develop as a result of conscious and violent struggle between conflicting interests within the nation and not as a result of imperceptible growth. That applies to the law relating to trade unions and industry.

The opponents of Savigny pointed out that if his theory of *Volksgeist* was taken literally, that would have thwarted the unification of Germany permanently by emphasising the individuality of each separate State of Germany and by fostering a parochial sense of nationalism.

Another inconsistency in the work of Savigny was that while he was the protagonist of the *Volksgeist* doctrine, he worked for the acceptance of a purified Roman law as the law of Germany. At that time, there was in Germany a vigorous school of jurists who strongly advocated the revival of ancient Germanic laws and customs as the foundation of a modernised German legal system. Savigny's opposition to the expulsion of Roman law and its adoption as the law of Germany was inconsistent with his idea of the *Volksgeist* of the German nation. One explanation lies in his personal devotion to Roman law. In order to account for the original reception of an alien system, Savigny argued that at that date the Germanic law was not capable of expressing the *Volksgeist*. However, this fails to show how an alien system was better able to express the *Volksgeist* than the indigenous law of Germany. Far from the law being a reflection of the *Volksgeist*, the *Volksgeist* had been shaped by the law.

Savigny's veneration for Roman law led him to advance doubtful propositions. There was a strict adherence to the doctrine of privity of contract in Roman law and the law of negotiable instruments was opposed to it. Hence Savigny condemned negotiable instruments as "logically impossible". This was so although the feelings of the commercially minded people were strongly in favour of negotiable instruments. The weakness of Savigny's approach was due to the fact that he venerated past institutions without regard to their suitability to the present.

The view of Savigny was that the *Volksgeist* formulates only the rudimentary principles of a legal system and could not provide all the necessary details. Therefore, as society becomes more complex, a special body of persons is called into being whose business it is to give technical, detailed expression to the *Volksgeist* in the various matters with which law has to deal. That body of persons consisted of the lawyers whose task was to reflect accurately the prevailing *Geist*. Dias points out that this is nothing but a fictitious assumption to cover up an obvious weakness in its thesis which was not related to reality in any way.

There was another weakness of the thesis of Savigny. According to him, the only persons who talked of the *Volksgeist* were academic jurists who were not versed in the practical problems of legal administration. The *Volksgeist* resolved itself into what these academic jurists imagined it to be. Dias says that it is possible that there is a very limited sense in which the contention of Savigny is acceptable. The *Volksgeist* manifests itself, if at all, only in a few branches of law and even then by way of modifying and adapting any innovations that may be introduced. It may be presumed that in those spheres of law it would be helpful if the legislators took account of tradition while framing new laws.

The view of Savigny was that legislation was subordinate to custom and at all times it should conform to the *Volksgeist*. Savigny did not oppose legislation or reform by codification at some appropriate time in the future but his attitude was generally that of pessimism. He opposed the project of immediate codification on many grounds. He pointed out the defects in the contemporary codes which contained adventitious, subsidiary and often unsuitable rules of Roman law, even while they rejected the main principles. Another argument was that there were matters on which there was no *Volksgeist* and a codification might introduce new and unadaptable provisions and that would add to the prevailing difficulties. Another objection was that codification could never cater exhaustively for all problems that were likely to arise in the future and hence codification was not a suitable instrument for the development of law. Another objection was that an imperfect code would create the worst possible difficulties by perpetuating the follies underlying it. Lawyers were in a better position to create a

perfect code and could cope with the emerging problems. Another objection was that codification would highlight the loopholes and weaknesses of the law and thereby encourage evasion. The view of Savigny was that codification should be preceded by "an organic, progressive, scientific study of the law" by which he meant a historical study of law and reform was to wait for the results of the work of the historians. Reformers were not to plunge into legislation without taking into consideration the past and the present. Savigny was overcautious in this matter. According to C. K. Allen, the doctrines of Savigny had the tendency "to hang traditions like fetters upon the hands of reformative enterprise". (*Law in the Making*, p. 17).

The view of Lord Lloyd is that the advocates of the *Volkgeist* seem to assume that every "people" is in some way an identifiable entity, with a corporate conviction or will of its own. This approach later crystallised in Gierke's theory of the "real" personality of corporate bodies. We are required to accept that collective groups possess some kind of metaphysical personality distinct from the members comprised in the group. It is also implied that the notion of a "people" is a perfectly definite one that can be applied to specific groups which possess this mysterious collective consciousness. This appears to postulate a degree of unity of thought and action in particular nations, races or the inhabitants of political units of which there is little evidence in human history. It seems to ignore the role and effects of conquest by war such as the position of enslaved and servile populations and the control of nations and empires by ruling minorities who may impose new patterns on their subjects. This theory also does not deal with the introduction of alien law and custom by peaceful penetration such as the adoption of a Western Code in Japan. Savigny was very much impressed by the remarkable phenomenon of the so-called "Reception of Roman Law" into Germany in the 16th century which he regarded as "the greatest and most remarkable action of a common customary law in the beginning of the modern age". His explanation that it was adapted into the popular consciousness of the German people is hardly convincing and is really little more than a legal fiction. The strangest of paradoxes in Savigny's thought was that "to probe the spirit of the German

*Volk*, Savigny went straight back to Roman law". (*Introduction to Jurisprudence*, pp. 633-34).

Lord Lloyd also points out that Savigny underrated the significance of legislation for modern society. Sir Henry Maine rightly pointed out that a progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved in modern times the essential means of attaining that end. With that objective, the legislative authority, while paying heed, if not lip service, to public opinion, has to provide a lead in many directions where the public is confused or undecided and even in some cases where there may be widespread hostility to a proposed reform. If the legislator had been obliged to wait upon the public mind to give clear guidance as to each future step, the history of law reform during the last century would have been deprived of most of its achievements. (*Ibid.*, pp. 635-6).

Criticising the views of Savigny, Paton points out that some customs are not based on an instinctive sense of right in the community as a whole but on the interests of a strong minority. That applies to the institution of slavery. While some rules may develop unconsciously, others are the result of conscious effort. That applies to the law relating to trade unions.

Paton contends that the creative work of the judge and jurist was treated rather too lightly by Savigny. The life of a people may supply the rough material, but the judge must hew the block and make precise the form of law. It is dangerous to regard the judge as a mere passive representative of the *Volksgeist*. Both in equity and in common law, we can still trace the influence of the masters of the past.

Paton also points out that imitation plays a greater part than the Historical School would admit. Much Roman law was consciously borrowed. The countries of the East have borrowed from the codes of Germany and France.

Pound points out that Savigny encouraged "juristic pessimism" which means that legislation must accord with the instinctive sense of right or it was doomed to failure. Conscious law reform was to be discouraged.

Another criticism against Savigny is that he was "so occupied with the source of the law that he almost forgot the stream". He overlooked the forces and factors which influence and determine the growth of law.

Certain invariable traits like the mode of evolution and development noticeable in all the systems of the world, are left unexplained in the theory of Savigny. Legal developments in various countries show some uniformity to which Savigny paid no heed. Prof. Korkunov writes: "It does not determine the connection between what is national and what is universal."

Though Savigny has been described as Darwinian before Darwin, the sociologist before sociologists, his last published work appeared only six years before the publication of Darwin's *On the Origin of Species* in 1859. He was still living in 1861 when Darwin's book detonated upon the world. As at the beginning of his life-work a new era opened up in legal history, likewise at its end a new era of similar tendency started in natural history. Whether philosophically or scientifically considered, evolution was no new doctrine, but the principle of natural selection formulated as a law influenced every department of thought. Darwinian biology has enormously influenced every branch of study since it was first propounded and jurisprudence which had already set upon the path of a new historical method, could not escape that influence. Even the mind uninstructed in the principles of natural science could not fail to be impressed, almost awed by the fact of the extraordinary interdependence of all known forms of life. Darwinian theory gave a new scientific backing to the upholders of the Historical School. In the terminology of Pound, it substituted a biological for a mechanical interpretation of the facts of life. It reinforced the central theory of that school that the law of any nation is dependent on its history and hence there could be no proper understanding of the law of a nation without a study of its history. Savigny also maintained that the law of a nation was as dependent on its history as its language or religion. A code ought to reflect the history of a nation's law and embody those national characteristics which were the product of its history.

The view that law is closely connected with the people and closely evolves contained the germs of future sociological theories.



After Savigny, Ehrlich stressed the importance of the study of "living law" which, according to him, is different from the dry skeleton of law, that is, law in its formal shape. Savigny sounded a note of warning against hasty legislation and the introduction of revolutionary ideas and aspirations based on abstract principles.

Savigny was himself trained under the powerful influence of the philosophical school. His own definition of law is remarkable for its resemblance to the Kantian definition. According to Savigny, law is "the rule whereby the invisible borderline is fixed within which the being and activity of each individual obtains a secure and free space". His divergence from the philosophical school is with reference to the true nature of law and the source from which it proceeds. While the philosophical school conceived of law as originating in man's reason and having its authority in its ethical or moral basis, Savigny saw law as a spontaneous evolution of the national spirit, having its justification in the social pressure behind it or in historic necessity.

*Savigny's contribution.*—Savigny is considered by many to be the greatest jurist of the 19th century. The view of Ihering was that with the appearance of Savigny's earliest work in 1803, modern jurisprudence was born. His theory came as a powerful reaction against the 18th century rationalism and principles of natural law. The view of Allen is the "the historical movement in jurisprudence may be called the revolt of fact against fancy". The view that the source of law is the instinctive sense of right possessed by the community negated the conception of the unitary sovereign whose command is law. He made "the juristic world perpetually conscious of the iceberg quality of law, with its present pinnacle concealing and denying the hidden nine-tenths of its past". The only defect with the theory was that it exaggerated that aspect.

The view of Prof. Dias is that on the whole, the work of Savigny was a salutary corrective to the methods of the natural lawyers. He did undoubtedly grasp a valuable truth about the nature of law, but ruined it by overemphasis. (*Jurisprudence*, p. 526).

The great truth in the theory of *Volksgeist* is that a nation's legal system is greatly influenced by the culture and character of

the people. Savigny was mainly occupied with how law <sup>pub-</sup> be-  
and whether it tends, or what the conscious effort can make <sup>the</sup> <sup>on</sup> <sup>1</sup>  
tend and his thesis still substantially holds good.

It was after Savigny that the value of the historical method was fully understood. Apart from his followers in his own country and on the continent, his method was followed in England by Sir Henry Maine, Vinogradoff, Lord Bryce and many others who made studies of the various legal systems on historical lines and traced the course of evolution of law in various societies. Pollock, Maitland, Holdsworth and Holmes pointed out in their works that the course of the development of Common Law was determined by social and political conditions of a particular period.

It was unfortunate that the doctrine of *Volksgeist* was used by the National Socialists in Germany for an entirely different purpose. To them, nation meant a racial group and it was the function of law to keep it pure and protected. This view led to the passing of brutal laws against the Jews during the regime of Hitler in Germany.

#### *Puchta (1798-1856)*

Puchta was not only a disciple of Savigny but also a great jurist of the Historical School. His work is considered to be more valuable as he made improvements upon the theory of Savigny by making it more logical. He started from the evolution of human beings and traced the development of law since that period. According to him, the idea of law came due to the conflict of interests between the individual will and general will. That automatically forms the state which delimits the sphere of the individual and develops into a tangible and workable system.

The contribution of Puchta lies in the fact that he gave two-fold aspects of human will and origin of the State. It is true that there are some points of distinction between Puchta and Savigny, but mostly they are similar. On some points, Puchta improved upon the views of Savigny and made them more logical.

#### *Gierke (1841-1921)*

Gierke was profoundly interested in the "association". He denied that the recognition of an association as a person depends

After,  
"li-  
s' to  
comes

571

ty of social control lies in the way in which in society organise themselves. He gave ations. He contrasted groups organised as the State, with those organised on a asis. He contrasted associations found-collaboration with those founded on the on. In his view, legal and social history is most ately portrayed as a perpetual struggle. In feudal society men were organised in tight hierarchical groups based on the holding of property. This system was opposed by groups such as the guild and the city. With the Renaissance and Reformation, the State appeared as the significant factor in social organisation.

Gierke represented a collectivist rather than an individualist approach. To that extent, his work touched on that of the sociologists, but his interpretation of this development on historical lines entitles him to be ranked among the historians. His doctrines of mass psychology anticipated modern enquiries. He failed to reconcile the independence of autonomous bodies with the supreme power of the State. He devised a pyramidal structure which made society consist of a hierarchy of corporate bodies culminating in the State.

### *Sir Henry Maine (1822-1888)*

Sir Henry Maine was born in 1822. He was educated at the Pembroke College, Cambridge where he attained great distinction as a classical scholar. In the words of Sir Frederick Pollock, Maine "entered the university an unknown youngman, he left it marked as among the most brilliant scholars of his time". (*Oxford Essays*, p. 149) After taking his degree, he started studying law and became law tutor of the Trinity Hall in 1845 and Regius Professor of Civil Law in 1847. He was a great success in both. He was called to the Bar in 1850 and in 1852, he became the First Reader on Roman Law at the Inns of Court. From 1862 to 1869, he was the Legal Member of the Viceroy's Executive Council in India and the Vice-Chancellor of the Calcutta University. During that period, he acquired knowledge of Indian law and institutions. On his return to England in 1869, he was appointed the first Corpus Professor of Jurisprudence at Oxford. In 1877, he became Master of Trinity Hall and in 1877 Whewell Professor of International Law at Cambridge. He died in 1888.

Maine began his work with a mass of material already published on the history and development of Roman law by the German Historical School. He could also rely on the information and experience gained during his stay in India. He was learned in English, Roman and Hindu law and had some knowledge of Celtic systems. He inaugurated the comparative approach to the study of law and of history in particular which was destined to play an important part in the years to come.

Maine published his first work *Ancient Law* in 1861. This was practically a manifesto to his lifework in which he stated his broadest general doctrines. His other important works were *Village Communities* published in 1871, *Early History of Institutions* published in 1875 and *Dissertations on Early Law and Custom* published in 1883.

Maine made a comparative study of the various legal systems and traced the course of their evolution. According to him, law develops through four stages. In the beginning, law was made by the commands of the ruler believed to be acting under divine inspiration, as the inspiration by the Themistes in the poems of Homer. In the second stage, commands crystallise into customary law. In the third stage, the knowledge and administration of customs goes into the hands of a minority, usually of a religious nature, due to the weakening of the power of original law-makers. The fourth stage was the time of codes. Law is promulgated in the form of a code, as Solon's Attic Code or the Twelve Tables in Rome.

Societies which do not progress beyond the fourth stage which closes the era of spontaneous legal development are called static societies by Maine. Their legal condition remains characterised by what Maine states as *status*. That is a fixed legal condition dominated by family dependence. The member of a family household, whether wife, child or slave, remains chained to the family nexus dominated by the *pater familias*.

*Fiction.*—Maine refers to a few progressive societies of history, for instance, the Romans and the nations of modern Europe which progressed beyond the phase of codes and status relationships because they are steered by a conscious desire to

improve and develop. The three agents of legal development that are brought to bear upon the primitive codes are in historical sequence *legal fiction*, *equity* and *legislation*. By the use of legal fictions, law is altered in accordance with changing needs while it is pretended that it remains what it was. To quote Maine: "I employ the expression 'legal fiction' to signify any assumption which conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the fiction of adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling-clothes, and taken its first steps toward civilization."

While speaking about the special significance of the fiction of adoption, Maine had in mind that it was the family expanded by that fiction which furnished the model and in some cases the actual historical forerunner of the larger political units of later societies.

The legal fiction of Maine has often been considered as a sort of clumsy, self-deluding kind of legislation. There are overtones of this view in Maine himself. However, this view of fiction is unjust and distorts the role it has played in the development of law. There is always the problem of legislative reform to fit changes into the established law so that they will not clash with those parts of the legal system which remain unaltered. With all carefully compiled statute books and elaborate indexes, modern legislation often fails to foresee points of rub between their innovations and the body of law against which they are projected. Modern legislature, with broad competence in law-making, is in a position to correct those oversights with curative legislation. No such recourse was available in primitive societies. Its legislation was piecemeal as there did not exist broad competence in law-making. In such a situation, the legal reformer acts wisely when

he gives to his innovations a form that will facilitate their absorption into the existing law. Legal fiction probably owes its origin not so much to a superstitious disrelish for change or some instinct for self-deceit, as to an impulse towards harmony and system. By giving to the new law the verbal form of the old, it facilitated its absorption into the existing corpus of rules.

Equity is then used to modify the law "as a set of principles invested with higher sacredness than those of original law". The final stage was that of *legislation*. People came to recognise the simple fact that law can be brought into existence by explicit declarations of intention incorporated in the words of legal enactments. The transition to the phase of legislation was not as simple as the account of Maine makes it appear. In the Anglo-American countries, though the possibility of an explicit law-making power has been recognised for centuries, fiction still finds occasional employment as a device for extending or modifying existing law. The body of law in question is that it is obligatory for a landowner to keep his premises in a safe condition. In this connection, an understandable distinction had developed between trespassers and invitees. The landowner has no obligation towards trespassers to keep his property in a safe condition for them and if a trespasser falls into an uncovered hole, the landowner is not responsible for it. A different rule applies to those persons who come to the premises with the express or implied permission of the landowner, e g., the guest, the postman and the delivery boy. If an invitee is injured on account of the carelessness of the landowner in keeping his property, he has to pay damages.

The corollary to these agencies of legal development in progressive societies is the "gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the family as the unit of which civil laws take account". The Roman family, the slave, the caste, the medieval guilds, the feudal nexus, are typical instances of status. Gradually the rigid position into which the individual is born and which he cannot leave, gives way to more freedom of will and movement. The authority of the *pater familias* loosens and the slave can be emancipated. As a slave, he can contract to the extent of the *peculium*, the medieval serf can become

free by escaping into the town and eventually slavery and serfdom are abolished. They give way to a free contractual relation between employer and employee. Progressive societies are characterised by increasing legal freedom of movement of the individual. The development is summed up by Maine in the following celebrated phrase: "If then we employ status to signify the personal conditions only and avoid applying the term to said conditions as are the immediate or remote result of agreement, we may say that *the movement of the progressive societies has hitherto been a movement from status to contract.*" (*Ancient Law*, p 170).

Sir Henry Maine did not reject the rationalising development of law. He accepted it as inevitable for the small number of progressive societies. His theory of the development of personal legal conditions from status to contract was a theoretical corollary to the freedom of labour and contract demanded by an expanding industrial and capitalist society. The effect of Maine's thesis was liberalising in spite of his personal tendency towards a conservative interpretation of history.

The views of Maine commended themselves to a society which had witnessed the American Civil War which resulted in the triumph of the industrial, commercial and progress-minded North over the agricultural, feudal and status-minded South. This means the victory of the free contract which is necessary for an industrialised and capitalist society which requires mobility of capital and labour. It meant the eclipse of status conceptions which tie the worker to an estate by an unchangeable slave status.

In Europe also, many peasant communities still living in a feudal condition were transformed into an industrial proletariat whose members entered into "free" contractual agreement with an employer. As long as the liberal and expansive phase of capitalism lasted, legal developments proved the thesis of Maine, e.g., abolition of legal prohibitions against labour and trade unions, the development of the legal position of married women in English law, from the original merger in husband's personality to complete legal independence achieved by the Act of 1935 or the gradual abolition of Catholic and Jewish civic disabilities. Within the sphere of Western civilization and up to the spread of modern

totalitarian systems, the differences in personal status and capacities were abolished. Wives emerged from the legal tutelage of husbands. Servants ceased to be bound to the master and household. In most modern laws, infants acquired a considerable degree of commercial and professional freedom. However, Maine's thesis was always subject to important limitations. It was never meant to apply to personal conditions imposed otherwise than by natural incapacity. It did not apply to the development of feudalism which moved from contract to status rather than the other way round.

Dr. Friedmann refers to the dialectic development by which the very removal of fetters imposed by the status conditions of freedom of contract created the conditions for a new status. The counter-move came with the association of workers in trade unions which gradually succeeded in creating a more equal bargaining position and a growing amount of State interference in unmitigated freedom of contract, designed to remedy some of the worst consequences of the freedom of contract. Both movements developed in all countries affected by industrialisation. England took the lead in the development of trade unionism. The abolition of the Combination Acts accelerated development. In the field of protective social legislation, Bismarck took the lead by passing a series of Social Insurance Acts which were copied in England in 1911. Both of these developments were weak in the United States as the doctrine of freedom of contract was most firmly embedded there.

Social legislation leads to such "status fetters" on freedom of contract as Workmen's Compensation Acts, Minimum Wages Acts, Factory Acts, National Insurance Acts etc. The principle of social insurance which is based on compulsory contribution from employers and employees and thus limiting the freedom of fixing the terms of contract, has now led to the comprehensive British National Insurance Act, 1946 which covers the whole population.

The growth of trade unions and business associations leads to the replacement of individual bargaining by collective group agreements which curtail the freedom of the individual on both sides by penalising the outsider and compelling the member to submit to collective terms. The worker who joins the



trade union and the industrialist who joins the cartel sacrifices his freedom to some extent. In return, the industrialist and the worker who adheres to a long-term collective agreement, gains security of price, production, employment or pension.

Another factor which has greatly modified the freedom of contract is the standardisation of contract terms which substitute, for freedom of bargaining, status-like conditions in the great majority of modern transport, insurance, mortgage or landlord and tenant contracts. Terms are largely fixed and the parties face each other as members of social classes and not individuals. In form, they bargain freely but in substance they do not. Another type of contract which differs from free contract between equal parties is the standard contract between government departments and private firms.

The rise of modern totalitarian government has produced a far-reaching return to a more direct status condition. Fascist labour legislation tied the workers to their jobs and created several classes of citizens, from a master class to a slave class. Even in non-Fascist countries, many limitations were imposed on the freedom of labour and contract during the World War II.

Dr. Friedmann points out that trends in the world are not uniform. It is an oversimplification to assert that "a progressive civilisation is marked by a movement from subjection to freedom", from "status to contract" and from "power to law" and "a retrogressive civilisation is characterised by the reverse process".

Sir Henry Maine himself never made such a sweeping statement and nearly a century of social upheavals have exposed the fallacy of this purely formal concept of freedom. Graveson sums up the present position in these words: "On the one hand the movement in domestic status is away from dependence on the head of the family, with its corollary of vicarious liability, towards full individual legal capacity; on the other, State interference in the terms and conditions of employment in industry has given rise to a new type of personal legal condition which bears many of the features of status."

The view of Prof. Dias is that an evaluation of the work of Maine must take into account the pioneer character of his

comparative investigation. Since his time, anthropology has developed into a separate branch of learning. Modern research has corrected Maine's work at many points and departed from it at others. However, one should be charitable about his errors and marvel at his genius in accomplishing so much. As regards his view regarding development of society from status to contract, there was much to support it. In Roman law, there was the gradual amelioration of the condition of children, women and slaves, the freeing of adult women from tutelage and the acquisition of a limited contractual capacity by children and slaves. In English law, the bonds of serfdom were relaxed and ultimately abolished. Employment came to be based on a contractual basis between master and servant. In the time of Maine, legislation removed the disabilities of the Catholics, Jews, Dissenters and married women. Maine saw the triumph in the Civil War in America of North America, a community based on contract, over South America which was feudal and status-regulated. However, a return to status has been detected in modern times. The individual is no longer able to negotiate his own terms. We have standardised contracts and collective bargaining. The view of Dias is that these developments should not be held against Maine who was not purporting to prophesy and who expressly qualified his proposition by saying that the development had "hitherto" been a movement towards contract.

Prof. Dias further points out that modern anthropologists have many advantages which were not available to Maine. The conclusions of Maine about primitive law have been discredited or modified now. The idea that early development passed through the successive stages of personal judgments, oligarchic monopoly and code has been abandoned on the ground that it is too simple a picture of that period. Primitive societies were more complex than what was thought before. There have been several forms of such societies. It is now thought that there were seven grades of them. The degree of development of social institutions bears some correspondence with the degree of economic development. The conclusion is that primitive societies exhibited a wide range of institutions and there was nothing like a single pattern as supposed by Maine. There has also been a modification of the

sequence suggested by Maine. Deliberate legislation is now seen to have been an early method of law-making with fiction and equity coming later on. The codes were chiefly collections of earlier legislation. Primitive law was not so rigid as was supposed by Maine. The people were bound to primitive law inflexibly. There was considerable latitude in the content of customary practices. It is generally agreed that even in primitive societies people controlled their destinies and were not blindly subservient to custom. (*Jurisprudence*, pp. 534-36).

It used to be accepted that law and religion were indistinguishable in primitive societies. However, the exact extent of their association is doubtful. Diamond criticises Maine most strongly for his assertion that they were indistinguishable. According to him, the association of law and religion is a comparatively later development. However, Maine is defended on this point by Hoevel.

The view of Dr. Friedmann is that Maine's theory, though careful in its generalisations, reflects the belief in progress through the emancipation of the individual which reached its climax in the first-half of the 19th century. (*Legal Theory*, p. 170).

Critics point out that in totalitarian States, there has been a strong shift to status again. In those countries, no contract is allowed which is in any way not in consonance with the State plan or is harmful to society. According to Maine, societies have not remained progressive but have become retrogressive. The theory of Maine was true during his lifetime and was merely an echo of the industrial development and the formation of a capitalist class which demanded freedom of contract and labour. Another limitation of Maine's theory was that it was not meant "to apply to personal conditions imposed otherwise than by natural incapacity".

In one sense, Maine's theory still holds good. The trend of legislation in countries which are underdeveloped is still to remove personal disabilities which arise due to the membership of a class (status). The Hindu Marriage Act, the Hindu Succession Act etc. are examples of it. Likewise, labour laws and land laws passed during recent years have helped in the emancipation of workmen and peasants. The conclusion is that so

long as capitalism has a stronghold, the theory of Maine holds good. When its forces start withering away, there is a contrary movement. In a totalitarian State, the freedom of contract is confined to the narrowest limits and the theory of Maine does not apply there.

*Contribution of Maine.*--The view of Dr. Friedmann is that the work of Maine stands out as the important and fruitful application of comparative legal research to a legal theory inspired by principles of historical evolution. His great contribution to legal theory lies in the combination of what is best in the theories of both Montesquieu and Savigny, without the dangers involved in both. Maine's theory avoids the danger of an excessive disintegration of theoretical laws of legal evolution, inherent in Montesquieu's comparative and factual approach to the development of legal institutions. It is also free from the abstract and unreal romanticism which vitiates much of Savigny's theory about the evolution of law. (*Legal Theory*, p. 164).

Pospisil writes that Maine's contribution to jurisprudence lies not so much in his specific conclusions as in "the empirical, systematic and historical methods he employed to arrive at his conclusions and in his striving for generalizations firmly based on the empirical evidence at his disposal . . . . He blazed a scientific trail into the field of law, a field hitherto dominated by philosophizing and speculative thought". (*Anthropology of Law*, p. 150).

In his Introduction to Maine's *Ancient Law*, Sir Frederick Pollock writes: "We may toil the fields that the master left untouched, and one man will bring a better ox, yoke to the plough and another a horse, but it is master's plough still."

It is contended that none can impugn the originality of the methodology of Maine who did immense pioneer work on the growth of law and social institutions. Together with his remarkable pathfinding, Maine preserved a balance of approach which contrasts well with that of Savigny. It must be remembered that unlike Savigny, Maine did not allow his method of work to lead him into a fanciful theory of the nature of law. He did not seek to tell us what law is, but taught us many things of immense value about the way law grows up.

Maine presented a balanced view of the history of law. The other writers had put too much emphasis on the study of Roman law. The greatness of Maine lies in the fact that he added to Roman law the study of the legal systems of many other countries. His conclusions are based on a comparative study of the different systems of law and hence their value is greater than those studies which rely upon Roman law alone.

It is true that Maine recognised legislation as an important source of law, but while doing so he avoided the excesses of the Philosophical School of Germany. He used his knowledge of the history of law to understand what had been in the past and not to determine its future course. His greatness lies in the fact that he preached a belief in progress and that contained the germs of sociological approach. Men like Maitland, Vinogradoff and Lord Bryce were immensely influenced by his writings.

Maine gave a balanced view of history. Savigny had explained the relation between community and law but Maine went further and pointed out the link between the developments of both and purged out many of the exaggerations which Savigny had made.

*Influence of Maine.*—Many writers in England were influenced by the writings of Sir Henry Maine. Friedmann, Seeley and Sidgwick made valuable studies in comparative politics. Dicey compared the English Constitution with other constitutions and also gave a historical survey of the legislation during the 19th century. His views are to be found in his *Law of the Constitution* (1885) and *Law and Public Opinion in England* (1905). Maitland applied the historical method to a study of the legal position of the groups within the State. Dr. Figgis traced the relation of the Church with the State and advocated the rights of ecclesiastical groups. His important works are *Churches in the Modern State*, *Divine Right of Kings* and *From Gerson to Grotius*. Lord Bryce travelled a good deal and studied the political institutions in various countries and employed the historical and comparative methods in all studies. The names of some of his important works are *Modern Democracies*, *The American Commonwealth* and *Studies in History and Jurisprudence*.

From a comparative study of Roman and English legal evolution, Bryce drew a number of important conclusions. He

considers as the law of best scientific quality "that which is produced slowly, gradually, tentatively, by the action of the legal profession". The high quality of the Roman system of private law is largely due to the existence of "an organ of government specially charged with the duty of watching, guiding and from time to time summing up in a concise form the results of the natural development of the law". The law more directly influenced by political changes is most successfully created "by the direct action of the sovereign power in the State, whether the monarch or the Legislative Assembly acting at the instance of the executive". The view of Dr. Friedmann is that the studies of Bryce serve as a corrective to Savigny's overemphasis on the law, influenced by the juristic profession, as compared with the "spontaneous and irregular" development of law due to economic and social phenomena. (*Legal Theory*, p. 172).

### Estimate of Historical School

The one invaluable contribution which the Historical School has made to the problem of the boundaries of jurisprudence is that law cannot be understood without an appreciation of the social milieu in which it has developed. Historical jurisprudence is a movement for fact against fancy, a call for a return from myth to reality. In this sense it cannot be said to be a juristic school, independent of history, unless it furnishes a method of progress and evolution for interpreting and developing law. If law evolves, the Historical School must tell us how it evolves. If it is incapable of that or refuses to do that, it ceases to be a juristic school since it is powerless to furnish a creative method.

The view of Paton is that the historical method in jurisprudence should be supplemented by a critical approach based on a philosophy of law in order that a true perspective may be obtained. Evolution is not necessarily progress and one of the best aids to our own shortsightedness in dealing with the familiar common law is an acquaintance with many systems. This is well recognised by those who pursue the historical method today.

Saleilles gives his criticism of the Historical School of Law in these words: "The Historical School had opened the way; it remained as if glued to the spot, incapable of using the instru-

ment of evolution and practice which it had just proclaimed. The reason was that it had in advance clipped its wings and disarmed itself by declaring that it could not scientifically exert an influence on the development of the phenomena of law; it could merely wait, register and observe. It refused to become a method either of creative legislation or interpretation. The Historical School had abdicated.... To note after all is not to create. History in its application to the social sciences must become a creative force. The Historical School had stopped halfway."

### Comparison of Historical and Analytical Schools

According to Dias and Hughes: "The distinction between analytical and historical jurisprudence is not one of kind, but of emphasis. They are both analytical in method, the distinction between them being that in the one case attention is fixed on concepts as they are today, while in the other case account is taken of a process over a period of time. Not only does it seem misleading to indicate this distinction by affixing the term analytical to one, but the distinction itself breaks down in the case of some concepts, notably ownership, where it is not possible to understand their nature at the present time without reference to their history." (*Jurisprudence*, pp. 7-8).

#### *Historical School*

1. Historical School concentrates its attention on the primitive legal institutions of society.
2. Law is found and not made. Law is self-existent.
3. Law is antecedent to the State and exists even before a State comes into existence.
4. Law is independent of political authority and its enforcement. Law does not become law merely because

#### *Analytical School*

1. Analytical School confines itself to mature legal systems.
2. Law is an arbitrary command of the sovereign. It is the deliberate product of legislation.
3. If there is no sovereign, there can be no law:
4. The hallmark of law is its enforcement by the sovereign.

of its enforcement by the sovereign.

- |  |  |
|--|--|
| <p>5. Law rests on the social pressure behind the rules of conduct which it enjoins.</p> <p>6. Law is the rule by which the invisible borderline is fixed within which each individual obtains a secure and full space.</p> <p>7. Typical law is custom. "Human nature is not likely to undergo a radical change and, therefore, that to which we give the name of law always has been, still is and will forever continue to be custom." (Carter)</p> <p>8. Custom is the formal source of law. It is transcendental law and other methods of legal evolution, e g., precedent and legislation, derive their authority from custom. At any rate, custom derives its binding force from its own intrinsic vitality and not from judicial precedent or legislation purporting to follow or legalise it.</p> <p>9. While interpreting a statute, judges should also take into consideration its history.</p> | <p>5. Law rests upon the force of politically organised society.</p> <p>6. Law is the command of the sovereign.</p> <p>7. Typical law is a statute.</p> <p>8. Custom is not law until its validity is established by a judicial decision or Act of the Legislature. It is only a source of law.</p> <p>9. While interpreting a statute, judges should confine themselves to a purely syllogistic method.</p> |
|--|--|

### **Distinction between Legal History and Historical Jurisprudence**

Legal history is not synonymous with historical jurisprudence.



Legal history sets forth the historical process by which a particular legal system has grown and taken its present shape. On the other hand, historical jurisprudence is the history not of the legal system but of the first principles and basic concepts of the legal system. It traces how the concepts of property and contract originated and developed. Legal history tells us how the law of property or contract was altered and developed from time to time. There is no doubt that legal history is the storehouse from which the historical jurist draws his conclusions. With the help of legal history, he can demonstrate how the fundamental notions lying at the bottom of the legal system have evolved and trace scientifically the history of the first principles of law.

### SUGGESTED READINGS

- |                 |   |
|-----------------|---|
| Allen, C. K.    | : <i>Law in the Making.</i>   |
| Burrow, J. W.   | : <i>Evolution and Society</i> , 1966.                              |
| Carter, J. C.   | : <i>Law: Its Origin, Growth and Function.</i>                      |
| Diamond         | : <i>Primitive Law.</i>   |
| Dicey           | : <i>Law and Public Opinion in England in the 20th century.</i>     |
| Dicey           | : <i>Law and Public Opinion in England during the 19th century.</i> |
| Dias, R.W.M.    | : <i>Jurisprudence</i> , London, 1980.                              |
| Dias and Hughes | : <i>Jurisprudence.</i>   |
| Feaver, George  | : <i>From Status to Contract</i> , 1969.                            |
| Friedrich       | : <i>The Philosophy of Law in Historical Perspective.</i>           |
| Friedmann, W.   | : <i>Law and Social Change in Contemporary Britain.</i>             |
| Friedmann, W.   | : <i>Legal Theory</i> , London, 1960.                               |
| Fuller, L.L.    | : <i>Anatomy of the Law.</i>  |
| Ginsberg        | : <i>Evolution and Progress</i> , 1961.                             |
| Gray            | : <i>The Nature and Sources of the Law.</i>                         |
| Hall            | : <i>Readings in Jurisprudence.</i>                                 |
| Hoebel          | : <i>The Law of Primitive Man.</i>                                  |
| Holdsworth      | : <i>Some Makers of English Law.</i>                                |
| Jones           | : <i>Historical Introduction to the Theory of Law</i> , 1940.       |
| Lightwood, J.M. | : <i>The Nature of Positive Law.</i>                                |
| Lloyd, Lord     | : <i>Introduction to Jurisprudence</i> , London, 1979.              |
| Maine, H.J.S.   | : <i>Ancient Law</i> (edited by F. Pollock).                        |
| Paton, G.W.     | : <i>A Textbook of Jurisprudence.</i>                               |
| Popper, K.R.    | : <i>The Open Society and Its Enemies.</i>                          |

- Pound, Roscoe : *Interpretations of Legal History*, 1930.
- Pospisil : *Anthropology of Law*, 1971.
- Savigny, F.C. von : *On the Vocation of Our Age for Legislation and Jurisprudence*
- Seagle : *The Quest for Law*, 1941.
- Stone, J. : *Province and Function of Law*.

## XXV

### THE PHILOSOPHICAL SCHOOL OF LAW

According to Salmond: "Philosophical jurisprudence is the common ground of moral and legal philosophy, of ethics and jurisprudence." The Philosophical School rivets its attention on the purpose of law and the justification for coercive regulation of human conduct by means of legal rules. Kant has shown that the chief purpose of law is the provision of a field of free activity for the individual without interference by his fellow men. Law is the means by which individual will is harmonised with the general will of the community. Law achieves this harmony by delimiting the sphere of permissible free activity of each individual. The individual will is moulded by ethics in the path of virtue so that it may freely acquiesce in and identify itself with the general will. Law works in the opposite direction. It moulds the general will so that it may accommodate itself to the free play of individual will and identify itself with it. Thus there is a tendency for ethics and law to overlap and ultimately to coincide in the highest stages of their development.

The Philosophical School concerns itself chiefly with the relation of law to certain ideals which law is meant to achieve. It investigates the purpose of law and the measure and manner in which that purpose is fulfilled. The philosophical jurist regards law neither as the arbitrary command of a ruler nor the creation of historical necessity. To him, law is the product of human reason and its purpose is to elevate and ennoble human personality.

The Philosophical School is interested primarily in the "development of the idea of justice as an ethical and moral phenomenon and its manifestation in the principles applied by the courts".

#### **Jurisprudence and Ethics**

As regards the relation between jurisprudence and ethics, the Philosophical School regards the perfection of human personality

as the ultimate objective of law. The science of Ethics which deals with the principles and moral considerations affecting man's conduct and constituting his criterion of right and wrong, also sets for itself the goal of making man virtuous and perfect. As the ultimate objectives of jurisprudence and ethics are coincident, the philosophical jurists seek to differentiate between the subject matter of the two sister sciences.

Kant made a clear distinction between law and ethics. To quote him: "Ethics concerns itself with the laws of free action in so far as we cannot be coerced to it, but the strict law concerns itself with free action in so far as we can be compelled to it." Ethics is the science of virtue and law belongs to the science of right. Ethics aims at the elevation of man's inner life while law seeks the regulation of his external conduct. Organised society should not exercise compulsion to make man virtuous. Compulsion should be confined to the regulation of man's external conduct. To quote Kant again: "Woe to the political legislator who aims in his Constitution to realise ethical purposes by force, to produce virtuous intuition by legal compulsion. For in this way he will not only effect the very opposite result, but will undermine and endanger his political Constitution as well."

The proximate object of jurisprudence is to secure liberty to the individual and its ultimate object is the same as that of ethics which is the attainment of human perfection. Liberty is an essential prerequisite to the perfection of human personality. In realising its proximate object, jurisprudence becomes a means towards the realisation of the ultimate object which is also the special object of ethics to achieve. It is in this way that philosophical jurisprudence becomes the meeting point and common ground of ethics and jurisprudence.

According to Salmond, a book of ethical jurisprudence may concern itself with all or any of the following matters: the concept of law, the relation between law and justice, the manner in which law fulfils its purpose of maintaining justice, the distinction between the sphere of justice as the subject matter of law and other branches of right with which law is not concerned and which pertain to morals exclusively, and the ethical significance and validity of those legal concepts and principles which are so funda-

mental in their nature as to be the proper subject matter of analytical jurisprudence. Salmond concludes that further than this "the proper scope of ethical jurisprudence does not extend. So far as any book goes beyond this general theory of justice in its relation to law, it passes over either into the sphere of moral philosophy itself, or else into the sphere of that detailed criticism, of the actual legal system, or that detailed construction of an ideal legal system, which pertains neither to jurisprudence nor to legal philosophy but to the science of legislation".

Philosophical jurisprudence is more ethical than law. Its theories mostly go beyond their proper scope. To quote Lord Bryce: "Some soar so high through the empyrean of metaphysics that it is hard to connect their speculations with any concrete system at all. Others flutter along so near the solid earth of positive law that we can see them perching on the stores and discover the view they take of questions with which the practical lawyer or legislature has to deal."

### **Exponents of Philosophical School**

The chief exponents of the Philosophical School in England were Francis Bacon (1561-1626), Hobbes (1588-1671), Locke (1632-1704) and Blackstone, and on the Continent were Grotius (1583-1645), Kant (1724-1804), Hegel (1776-1831), Fichte (1762-1814), Kohler (1849-1919), Stammler (1856-1938), Del Vecchio and Lorimer. The historical jurists like Bruns (1816-1880), Gneist (1816-1895) and Windschild (1817-1892) also recognise the importance of the Philosophical School.

#### *Grotius*

Hugo Grotius, the celebrated founder of international law, is also regarded as the father of philosophical jurisprudence. In his book *The Law of War and Peace*, Grotius showed that a system of natural law may be derived from the social nature of man. He defined natural law as "the dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity". The view of Grotius was that the agreement of mankind concerning certain rules of conduct is an indication that those rules originated in right reason. Such general concordance

eh demonstrated by referring to the utterances of poets and philosophers, the pronouncements of historians and men of letters and the teachings of the Roman law. In this way, he built up a system of natural law that should command universal respect by its own inherent moral worth.

The three great philosophers of Germany—Kant, Fichte and Hegel—devoted a considerable part of their philosophy to law. Although they differed in their systems and conclusions from one another, they shared some fundamental ideas. They all deduced their legal philosophy from certain fundamental principles which they discovered through an inquiry into the human mind. While studying the human mind, they started from the fundamental Aristotlean principle that man is a rational free willing being distinct from nature. Man, as an animal, is a part of nature and thus subject to the physical laws of nature. As man is endowed with reason, he is distinct from nature and capable of dominating it.

*Immanuel Kant (1724-1804)*

Kant gave modern thinking a new basis which no subsequent philosophy could ignore. The "Copernican Turn" which he gave to philosophy was to replace the psychological and empirical method by the critical method, by an attempt to base the rational character of life and world not on the observation of facts and matter but on human consciousness itself. That was done by Kant by a systematic inquiry into the functions of human reason.

In his *Critique of Pure Reason*, Kant set himself the task of analysing the world as it appears to human consciousness. He drew a fundamental distinction between form and matter. Impressions of our senses are the matter of human experience which is brought into order and shape by human mind. Emotions become perceptions through the forms of space and time, perceptions become experience through the categories of understanding such as substance and causality, quality and quantity, the judgments of experience are linked with each other by general principles. Nature follows necessity but human mind is free because it can set itself purposes and have a free will.

Kant then inquires whether there are any general principles which can be laid down as a basis of man's volition and thus of

all ethical action. Such basis cannot be gained from experience. It must be given *a priori*, but not logical, necessity. It can only be stated as a postulate for man, as a free and rational being. The freedom of man to act according to this postulate and the ethical postulate itself are necessary co-relatives. No ethical postulate is possible without this freedom of self-determination and the ethical postulate is a necessary condition of freedom. The substance of this ethical postulate is the Categorical Imperative of Kant.

Kant's Categorical Imperative says: "Act in such a way that the maxim of your action could be made the maxim of a general action." This imperative is the basis of Kant's moral as well as legal philosophy. But the spheres of morality and law are clearly distinct. Morality is a matter of the internal motives of the individual. Legality is a matter of action in conformity with an external standard set by the law. Kant's legal philosophy is entirely a theory of what the law ought to be. His is the legal philosophy of a philosopher, not of a lawyer. From the Categorical Imperative, Kant deduces his definition of law in these words: "Law is the aggregate of the conditions under which the arbitrary will of one individual may be combined with that of another under a general inclusive law of freedom."

It follows from the above that compulsion is essential to law and a right is characterised by the power to compel. Kant distinguished between legal duties and legal rights. He also distinguished between natural rights and acquired rights. He recognised one natural right of the freedom of man in so far as it can coexist with everyone else's freedom under a general law. Equality is implied in the principle of freedom. The right to property is considered by Kant as an expression of personality. Kant also discussed marriage through which an individual acquires a right over another. But the other person, by acquiring a similar right in return, recovers his personality.

Kant considered political power as conditioned by the need of rendering each man's right effective, while limiting at the same time through the legal right of others. Only the collective universal will armed with absolute power can give security to all. This transfer of power Kant based on the social contract which

was not a historical fact but an idea of reason. The social contract is so sacred that there is an absolute duty to obey the existing legislative power. Rebellion is never justified. Kant considered a republican and representative State as the ideal. Only the united will of all can institute legislation. Law is just only when it is at least possible that the whole population should agree to it. Kant was in favour of separation of powers but was opposed to the privileges of birth, an established church and autonomy of corporations. He was also in favour of free speech.

According to Kant, the function of the State is essentially that of protector and guardian of the law. The State is not to undertake comprehensive functions in order to ensure the maximum liberty of the individual. It is not the task of the State to make the subject happy according to its own judgment. Kant writes: "When the sovereign limits himself to his proper task of maintaining the State as an institution of the administration of justice and interferes with the welfare and happiness of citizens only so far as it is necessary to secure this end, when, on the other hand, the citizen is allowed freely to criticise acts of government but never seeks to resist it — then we have this union of the spirit of freedom with obedience to law and loyalty to the State which is the political ideal of the State."

The aim of Kant was a universal world State. The establishment of a republican constitution based on freedom and equality of States was a step towards a League of States to secure peace. However, he was doubtful of the practical possibility of a "State of Nations". He saw no possibility of international law without an international authority superior to the States.

#### *Fichte*

The legal philosophy of Fichte is deduced from the self-consciousness of the reasonable being. No reasonable being can think himself without ascribing free activity to himself. Freedom is of necessity mutual. The sphere of legal relations is that part of mutual personal relations which regulates the recognition and definition of the respective spheres of liberty on the basis of free individuality.

On the relation of law and morality, the view of Fichte is that whereas there is a moral duty to respect the liberty of others



absolutely, a legal duty to do so is dependent on reciprocity. Unless my liberty is recognised in turn, the law gives me a right of compulsion to enforce my fundamental rights. According to Fichte, certain elementary rights of the individual must be protected by the State as those are the necessary conditions of personal existence. The law must realise justice and the State must be *Rechtsstaat*. Fichte did not demand a written constitution to fix the fundamental rights. His Social Contract is divided into a property contract and a protection contract. Through property one becomes a citizen.

The relation between individual and State is defined in three principles: (i) Through fulfilment of civic duties, the individual becomes a member of the State. (ii) The law limits and assures the rights of the individual. (iii) Outside this sphere of civic duties, the individual is free and only responsible to himself. He is a man, not a citizen. The right to punish is a part of the social contract and is based on retaliation.

According to Fichte, the rights to be protected by the State are the right to live and the right to work. Without the latter, there can be no duty to recognise the property of others. The State has the duty to see that the necessities of life are produced in a quantity proportionate to the number of citizens and everyone can satisfy his needs through work. There are three main branches of public work, viz., natural production, trade and manufacture.

According to Fichte, war is based on force and not on law. Law can assert itself only in a League of Nations with a federal tribune endowed with authority to judge and military executive powers to enforce the judgment.

### *Hegel*

Hegel was the most influential thinker of the Philosophical School. His system is a monistic one. The idea unfolds from the simple to the complex by means of the dialectical process. There can be no dualism of any kind as any phase of reality is based on reason. To quote Hegel: "What is reasonable is real and what is real is reasonable."

According to Hegel, both the State and law are the product of evolution. Legal institutions are within the sphere of legal, ethical and political institutions. They are the expression of the free human mind which wishes to embody itself in institutions.

Hegel emphatically rejects the idea that marriage is essentially a contrivance for benefiting the individuals who marry. According to him, marriage is an institution based on reason and "being in love" is not its essential side. It cannot be dissolved like a contract.

The State is the synthesis of family and civil society. It is a unity of the universal principle of family and the particular principle of civil society. It is an organism in which the life of the parties is embodied. It is not an authority imposed from outside upon the individual. It is the individual himself which thus realises his true universal self. The State thus is freedom.

According to Hegel, the constitution of the State embodies individual freedom and interest as much as the universal. It preserves the citizens' liberty and rights, fosters and advances their interests, their property and persons. The State has three aspects: the universal, the particular and the individual. In its universal function, it is a sort of law. In its particular functions, it applies laws to special cases and its individuality is embodied in the monarch. Hegel does not approve of the doctrine of separation of powers because he thinks that different powers checking each other will lead to the dissolution of the State. Therefore, Hegel approves the English system. He rejects democracy and universal franchise. The State is not the embodiment of the common will, the will of the majority, but of the rational will. The monarch embodies the individual function of the State. Hereditary monarchy is a philosophical necessity.

The view of Hegel is that the human spirit achieves cognition of its personality once it transcends the stage of mere physical sensation. Having awakened to the knowledge of itself as the free ego, it proceeds to assert itself and thus comes into conflict with other egos. The purpose of the legal order is to produce a synthesis of the conflicting egos in society by attuning the self-consciousness of each to that of the others and so merge the self-centred consciousness of each ego in the universal consciousness.

This purpose is achieved by the recognition of the freedom of the ego, limited only by the like freedom of other egos. Legal right is the objective realisation of such recognition by the universal will and aims at securing to each individual an external sphere of freedom, that is, of free activity as regards his person and property.

The great contribution of Hegel to philosophical jurisprudence is the development of the idea of evolution. According to him, the various manifestations of social life, including law, are the product of an evolutionary, dynamic process. This process takes on a dialectical form, revealing itself in thesis, antithesis and synthesis. The human spirit sets a thesis which becomes current as the leading idea of a particular historical epoch. In due course, against this thesis, an antithesis is set up and from the ensuing conflict a synthesis develops which, absorbing elements of both, reconciles them on a higher plane. This process repeats itself time and again in history.

In *Philosophy of Right and Law*, Hegel demonstrates that behind the colourful pageant of history is one pervading idea, the idea of freedom, and history is the march of the spirit of freedom. Legal history is the march of freedom in civil relations. Ecclesiastical bondage has given way to temporal freedom, tyrannical rule has given way to freedom of legal government and economic enslavement of the citizen has given way to economic freedom. Thus, society may change and has always changed. In the adaptation of the law to changing society, changes in law are governed by an ascertainable dialectic, the evolution of the grand idea of freedom. It is to this idea which is realising itself in history, that all law should conform. By conformance to this idea the purpose of the legal order would be fulfilled. That purpose is the raising of humanity to perfection.

*Criticism*: The influence which Kant, Fichte and Hegel have exercised on European legal philosophy is very great. As a legal philosopher, Kant did not produce a school of law. His contribution to legal philosophy stands between the rationalist natural law theories of the 17th and 18th centuries and liberalism of the 19th century. His critical philosophy of knowledge has been applied to law by the Neo-Kantian jurists.

As a legal philosopher, Fichte had not much influence in the 19th century but he had greater importance for the 20th century. Much of the teachings of del Vecchio were inspired by the general philosophy of Fichte. He exercised the greatest influence. His philosophy of the relation of the individual and the State laid the foundation of the ascendancy of the State over the individual and directly inspired modern Fascist ideas on the corporative and totalitarian State.

Much as they differed in their outlook and conclusions, none of them would have eliminated the individual in favour of the State, although the philosophy of Hegel lent itself to such an interpretation. Both Kant and Fichte emphasized the fact that the individual was man, apart from being a citizen and the State was bound to conform to the law built upon that foundation. Kant provided no guarantee for this postulate and his absolute denial of any right to revolt made this assertion rather theoretical. The chief danger in the philosophy of Hegel was that it could lead and actually led to the absorption of the individual in a deified State.

The three philosophers mixed with their general philosophy some astonishing doctrines which were mere expressions of personal opinions and prejudices. All three were not only great thinkers but also Professors in Prussia. Kant taught and lived all his life in East Prussia.

Kant's definition of law has remained the basis for all those conceptions of law and State which may be described as atomistic which denies the State any organic character and definitely sees a paramount object of life in the development of the individual. However, his definition contains the germs of social reformism. Kant's conception of law will regain ascendancy whenever individualist and cosmopolitan ideas prevail over organic and nationalist ideas.

Hegel has provoked admiration on the one hand and bitter condemnation on the other. The ideas of Hegel on the relation between State and individual and the purpose of history have inspired different political and legal philosophies. Whether one accepts or rejects his basic ideas is essentially a matter of political conviction. The main criticism must be directed against Hegel's use of the

dialectical method as a means of proving the logical and necessary character of his deductions in the field of law and other social sciences.

Hegel undoubtedly became the slave of his system. He was forced to cling to it if he wanted to prove the unity as well as the necessity of all parts of human life. His fundamental logical error lay in confusing opposites and distincts. The conception of being may be the logical opposite of nothing, but contract is not the logical opposite of property and police is not the logical opposite of administration of justice. Some regard Hegel as the greatest of philosophers while others condemn him as one of the greatest and most dangerous dilettantes in philosophy. Those who accept the political and legal principles of Hegel will derive great satisfaction from the impression of necessity created by the dialectic method. Men like Marx may use the dialectic method to prove the phases of historical evolution while completely rejecting the political assumptions of Hegel. Those who believe that the cardinal task of philosophy is to distinguish between objective truth and belief will condemn the influence of Hegel as dangerous in the extreme.

*Neo-Hegelians*: The disastrous effect of Hegel's spurious proof of the dialectic necessity is proved by the development of neo-Hegelian philosophy which has been directed towards the increasing glorification of the State as the embodiment of the spirit of world history.

Gioberti proclaimed the greatness of Italy as the centre of European civilisation and the culmination of history. Gentile emphasized the culmination of national development in Fascism.

Binder and Larenz were the modern German neo-Hegelians. In the name of dialectic integration, they demanded the almost unqualified abandonment of the individual to the State. Bosanquet arrived at slightly more moderate conclusions by a similar and equally dangerous argument. The view of Bosanquet was that the real will of an individual is what he would desire if he were, morally and intellectually, fully developed. The State embodies the purified intellectual and moral conduct of which the average individual is not capable.

There was a decline in the Philosophical School when the Historical School gained ascendancy. Savigny attacked the view that law could be made consciously by human reason embodied in legislation. He put forward his theory that law is the product of a people's genius unfolding itself in history and expressing itself in custom or popular practice. There was a revaluation of the cardinal tenets of the Philosophical School in the light of the criticism by the exponents of the Historical School. The chief defect lay in the assumption of an ideal, immutable law or natural law discoverable by reason, to which actual systems of law should correspond. The Historical School demonstrated the untenability of this assumption. The result was a radical change which is to be seen in the works of Kohler, Stammler and del Vecchio.

#### *Kohler (1849-1919)*

Kohler was under the influence of the Hegelians. He defined law as "the standard of conduct which in consequence of the inner impulse that urges man towards a reasonable form of life, emanates from the whole, and is forced upon the individual".

In his book *Philosophy of Law*, Kohler postulates the promotion and vitalising of culture as the end achieved through the instrumentality of law. By culture he means the totality of the achievements of humanity. The assumption of a Law of Nature, a permanent law suitable to all times, is not correct as it involves the notion that the world has already attained the final aim of culture. The actual fact is that civilisation is changing and progressing and law has to adapt itself to the constantly advancing culture. Every culture should have its own postulates of law to be utilised by society according to requirements. There is no eternal law or universal body of legal institutions, suitable for all civilisations. What is good for one stage of culture may be ruinous to another.

Dean Pound writes that Kohler's "formation of the jural postulates of the time and place is one of the most important achievements of recent legal science". (*Interpretations of Legal History*, p. 150).

#### *Stammler (1856-1938)*

Stammler is a neo-Kantian and his philosophical position is

summed up in *The Theory of Justice*. According to him: "There is not a single rule of law the positive content of which can be fixed *a priori*." However, he emphasises the need for the development of a theory of just law in addition to the investigation of positive law. The content of a given law can be tested with reference to the theory of "just law".

A law is just if it conforms to the social ideal of bringing about a harmony between the purposes of the individual and society. The Social Ideal is "a community of men willing freely". It represents the union of individual purposes. It requires the maintenance of the proper interests of every associate and the maintenance of social cooperation. The first requirement leads to two principles: (i) The content of a volition must not be left to the arbitrary control of another. (ii) Juristic claim must not subsist except on the condition that the one bound may still remain his own neighbour. These formulae prevent a juristic precept from sacrificing an associate to the subjective purposes of another and being treated as a means to the accomplishment of the other party. The second requirement of social cooperation leads to two principles: (i) He who is juristically united with others cannot be arbitrarily excluded from the community. (ii) A power of disposition juristically granted cannot be exclusive except in the sense that the one excluded may still remain his own neighbour. Stammler developed the application of these principles to the important spheres of juristic life under the section "The Practice of Just Law".

Having given his Social Ideal, Stammler admits that two legal systems which have very different rules and principles of law may both be in conformity with the Social Ideal. His conception of the Social Ideal gives us natural law with a changing content.

According to Stammler, law is volition. It is not concerned with the perception of the external physical world. It relates means and purposes to each other. It is the universally valid element common to all legal phenomena whatever their content.

According to Stammler, the use of a universally valid concept of law is partly philosophical and partly practical. Philosophically, the quest for a universal concept of law is a manifestation of the desire of the human mind to reduce all phenomena to that unity

which only the human mind can provide. To quote Stammler: "The idea of unity, as the highest condition of all imaginable scientific knowledge, is not a sum of legal details, but a peculiar ultimate way of ordering the contents of our consciousness. Thus the concept of law has also a pure conditioning mode for the ordering of our willing consciousness, on which depends the possibility of determining a particular question as a legal one."

The view of Stammler is that law is first of all volition because law is a mode of ordering human acts according to the relation of means and purposes. Sovereignty distinguishes law from arbitrary volition of an individual. A sound knowledge of law is not the knowledge of physical phenomena. It is the analysis of purposes to which the idea of law is to help in building up a fundamental conception of life.

Stammler maintains that just law is the highest universal point in every study of the social life of man. It is the only thing that makes it possible to conceive by means of an absolutely valid method, of social existence as unitary whole. It shows the way to a union with all other endeavours of a fundamental character. The concept of law gives the formal and universal elements of law. The ideal of law directs all possible means and purposes towards one aim.

The view of Stammler is that cartels, syndicates, trusts etc. achieve a social purpose by "opposing the anarchy of production and sale in the sphere of their activity.... They can lend protection and defence to the individual who, under conditions of unrestrained freedom, would not be able to realise his proper activity in the social economy, but on the other hand, they are a combination for personal ends and may become the means of abuse".

Before 1914, Stammler expressed the urge for scientific clarity and unity on the one hand and a new idealism on the other. He put the law scientifically on its own feet and revived legal idealism against the sterility of positivism.

About Stammler, Dr. Friedmann writes that he was torn between his desire as a philosopher to establish a universal science of law and his desire as a teacher of civil law to help in the



solution of actual cases. The result was an "idea of justice" which is a hybrid between a formal proposition and a definition of social ideal, kept abstract and rather vague by the desire to remain formal. Stammler produces solutions dependent on their specific social and ethical valuations which it was his chief endeavour to keep out of an idea meant to be universal. His solutions were based on certain assumptions and those were the recognition of private property subject to certain limitations regarding its use and equivalence of all uses of property regardless of their economic and social importance. (*Legal Theory*, p. 137).

### *Del Vecchio*

Del Vecchio developed, independently of Stammler, a theory of law on essentially similar foundations. He was a jurist of much greater elegance and universality than Stammler. His writings display a profusion of philosophical, historical and juristic learning.

According to del Vecchio, the concept of law must have reference only to its form, to the logical type inherent in every case of judicial experience. The logical form of law is more comprehensive than the sum of judicial propositions. He shows the error of those theories which have defined law from history, ethics, religion or generalised content. The concept of law is juridically neutral. It cannot distinguish between good and bad law and just and unjust law. This idea is not meant to be formal. It is based on ideas which can be traced from Aristotle to Vico, Kant, Fichte and Bergson. Man has a double quality. He is at once physical and metaphysical, both part and principle of nature.

Law is not only formal but has a special meaning and an implicit faculty of valuation. Law is a phenomenon of nature and collected by history. It is also an expression of human liberty which comprises and masters nature and directs it to a purpose. Law is the object of a qualitative progress of phenomena from mere formless matter to progressive organisation and individualisation. The aim is perfect autonomy of the spirit.

According to del Vecchio, justice has an ideal content which is the "absolute value of personality" or the "equal freedom of

all men". This ideal content is postulated by the inner conscience of man. It explains the ever-recurring quest for natural law.

There appears to be a definite break in del Vecchio's work. The models for his earlier and principal legal philosophy are Kant and the early Fichte. In his later work, it is definitely Hegel, particularly his theory on the relation between individual and State, between reality and idea and on the unfolding of an implied purpose of history. In his later work, del Vecchio abandoned his earlier philosophical position for his new political conviction without admitting it.

It is worthy of notice that historical jurists have now recognised the soundness of the main contentions of the Philosophical School. Bruns (1816-1880) writes that the emphasis laid by the Philosophical School upon the human and universal character of law led to the development of a purer legal philosophy "which no longer regards as its task the discovery of an absolute law of nature, but only seeks to recognise in their universality and necessity the general conceptions and ideas which attain concrete historical manifestation in the single national system of law".

Gneist (1816-1895) regarded himself a follower of Savigny but he has come to the conclusion that a fuller development of legal science can be attained only by taking up once again the natural law doctrines of the past and giving them further development. Windschild (1817-1892) writes that the antithesis of Philosophical and Historical Schools has disappeared by each recognising the correctness of the main contention of the other.

### SUGGESTED READINGS

- |               |  |
|---------------|--|
| Berolzheimer  | : <i>The World's Legal Philosophies.</i>                               |
| Bosanquet     | : <i>The Philosophical Theory of the State</i> , 1899.                 |
| Cairns        | : <i>Legal Philosophy from Plato to Hegel</i> , 1949.                  |
| Croce         | : <i>What is Living and What is Dead in Hegel's Philosophy</i> , 1912. |
| Del Vecchio   | : <i>Formal Bases of Law</i> , 1921.                                   |
| Friedmann, W. | : <i>Legal Theory</i> , London, 1960.                                  |
| Friedrich     | : <i>Philosophy of Law in Historical Perspective</i> , 1958.           |
| Hegel         | : <i>Philosophy of Right and Law.</i>                                  |

Hobhouse	: <i>The Metaphysical Theory of the State</i> , 1918.
Kant, Immanuel	: <i>Philosophy of Law</i> , (ed. Hastie, 1887).
Kohler	: <i>Philosophy of Law</i> .
Patterson	: <i>Jurisprudence</i> , 1953.
Pound	: <i>Interpretations of Legal History</i> .
Russell, B.	: <i>A History of Western Philosophy</i> .
Sabine	: <i>A History of Political Theory</i> .
Stammler	: <i>Theory of Justice</i> .

## XXVI

### SOCIOLOGICAL SCHOOL

The relations between the individual, society and the State have been changing and various theories regarding them have been propounded from time to time. In the beginning, society was governed by customs which had only a social sanction. Then came the supremacy of priests. After that, the secular State emerged and dominated all institutions. As a reaction, the importance of the individual was asserted by thinkers and philosophers. There were revolutions and political changes. There was the Industrial Revolution. The necessity of balancing the welfare of the society and individual was realised. There was a tendency towards socialisation. Then came the view that the importance of the society should be considered in the light of the individuals and *vice-versa*. The approaches made from this point of view are called sociological approaches. The sociological school gained ascendancy in the first decade of the 20th century.

The sociological school devotes its attention not to the ethical content and aim of law but to the actual circumstances which give rise to legal institutions and which condition their scope and operation. This is the functional view of law, regarded as one and only one of the many factors in the morphology of society. It is essentially concerned not with man as an individual but with man-in-association. The whole theory of the sociological school is a protest against the orthodox concept of law as an emanation from a single authority in the State, or as a complete body of explicit and comprehensive propositions applicable by accurate interpretations, to all claims, relationships and conflicts of interests. The sociological jurists look upon law as a phenomenon. Law is a social function, an expression of human society concerning the external relations of its individual members. The jurist should concentrate his attention not so much on individuals and abstract right as "willing agent" as on the social purposes and interests served by law.

Sociological jurisprudence has pointed law towards social justice and has assumed that law must seek to attain certain ends. What it needs is “(a) philosophy which will explain its method and furnish it with a rationale; and (b) one which will provide the sociological jurist with tools and show him how to use them by furnishing him with some scale of values by which he can hew and weigh through the experimental flux of the same legal order”. Dean Roscoe Pound writes: “The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law . . . for putting the human factor in the central place and relegating logic to its true position as an instrument.” It is a movement that does not disparage the force of logic, or of custom or of history. It is always busy in combating the exclusive consideration of any one of these factors and of a purely logical completeness of the law in particular and emphasising the final task of the balancing of interests.

Ehrlich has written thus: “At the present as well as at any other time, the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law.”

The sociological approach to jurisprudence which resulted out of the change in the political shift from doctrine of *laissez faire*, the industrial and technological revolution and finally the historical school bringing into focus the relationship between law and social welfare State of the modern century, has attempted to study law as seeking social origin of law and legal institutions, testing law as a given social phenomenon and lastly judging law by its social utility.

*Montesquieu (1689-1755)*

Montesquieu, the French philosopher, was the forerunner of the sociological method in jurisprudence. He was the first to recognise and take account of the influence of social conditions on the legal process. In *The Spirit of Laws*, Montesquieu wrote that law should be determined by the characteristics of a nation so that “they should be in relation to the climate of each country, to the

quality of each soil, to its situation and extent, to the principal occupations of the natives, whether husbandmen, huntsmen or shepherds, they should have relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners and customs". He perceived the importance of history as a means of understanding the structure of society and also drew attention to the part played by economic factors.

### *Auguste Comte (1798-1857)*

The honour of being the founder of the science of sociology belongs to Auguste Comte, another French philosopher. According to him, the legitimate object of scientific study is society itself and not any particular institution of government. He emphasized the fact that men have ever been associated in groups and it was in the social group and not in isolated individuals that the impulses originated which culminated in the establishment of law and government. He definitely rejected the view that society rests upon an individualistic basis and the individual is the focal point of law

According to Comte, society is like an organism and it can progress when it is guided by scientific principles which should be formulated by observation and experience of facts excluding all metaphysical and similar other considerations

The implications of Comte's theory are many. He had great influence on the philosophical and scientific thought of his time. In the field of legal theory, his ideas inspired Durkheim who in his turn inspired Duguit.

### *Durkheim (1858-1917)*

Emile Durkheim, the great French sociologist, took considerable interest in legal phenomena and added to our understanding of them. He was one of the earliest thinkers about the criminal process. His view was that law was the measuring rod of any society. Law "reproduces the principal forms of social solidarity". There are two basic types of societal cohesion (which he called solidarity): mechanical solidarity to be found in homogeneous societies and organic solidarity which was found in more heterogeneous and differentiated modern societies which rest on functional inter-

dependence produced by the division of labour. In a society based on mechanical solidarity, law is essentially penal. With increased differentiation societal reaction to crime becomes a less significant feature of the legal system and restitutive sanction becomes the main way of resolving disputes.

There are serious flaws in the arguments of Durkheim but his formulation on the evolution of law are still worth our attention. His discussion of the meaning of repressive law is particularly useful to an understanding of the social significance of crime and punishment. His emphasis on restitutive law is a corrective to those who think of all law as punitive. Twentieth century developments have vindicated his ideas on contract.

### *Herbert Spencer (1820-1903)*

The infant science of sociology received a tremendous impetus from the works of Herbert Spencer. By calling to aid ethnographical and anthropological material, Spencer demonstrated that society resembles individual organisms. Originating in small beginnings, they develop complex structures the component parts of which become more and more inter-dependent while the social organism itself becomes more and more independent of its constituent units

In *Principles of Sociology*, Spencer traced his theory of the origin of law. According to him, law arises from four sources: inherited usages with quasi-religious sanctions, injunctions of deceased leaders, the will of the predominant man and collective opinion of the community. Laws of supposedly divine origin are first differentiated from laws of recognised human origin. Human laws become further differentiated into those which are sanctioned by the ruler and those which are sanctioned by the aggregate of social interests and of these the latter, in the course of social evolution, tend more and more to absorb the former. Ultimately, "law will have no other justification than that gained by it as a maintainer of the conditions to complete life in the associated State".

For Spencer, evolution was the key to the understanding of human progress and legal and social development could best be

left to evolve by a natural selection parallel to that operating in the sphere of biology. Such a conclusion was regarded as in the highest sense scientific.

Spencer promulgated three fundamental laws of society: the principle of the persistence of force, the indestructibility of matter and the continuity of motion. The combination of these principles with other laws results in the process of evolution. "Evolution is an integration of matter and a concomitant dissipation of motion during which the matter passes from a relatively indefinitely incoherent homogeneity to a relatively coherent heterogeneity and during which the retained motion undergoes a parallel transformation".

Prof. Allen writes: "The interdependence of organisms in its sociological aspect means the mature relation of all members of civilised society and a distribution of a sense of responsibility far wider than can be comprised within the formula 'sovereign and subject'. It directed attention to the necessity of considering law in relation to other social phenomena."

*Duguit (1859-1928)* ✓

Leon Duguit was a Professor of Constitutional Law in the University of Bordeaux in France. He attacked traditional concepts of State, sovereignty and law and sought to fashion a new approach to those matters from the angle of society.

*Principle of Social Solidarity.*—According to him, the outstanding fact of society is the interdependence of the people. This interdependence has always been there, but it has increased in modern times on account of the increasing knowledge of man and his mastery over the physical world. In modern society we cannot live without the services provided to us by our fellowmen. Our food, our housing, our clothing, our recreation and entertainment are always dependent on the activities of other people. Specialisation has increased to such an extent that we can exist only by virtue of our membership of a community. Social interdependence is not a theory or a conjecture but a fact. It is an all-important fact of human life. All human activity and organisation should be directed to the end of ensuring the harmonious



working of man with man. Duguit calls it the *principle of "social solidarity"*.

As all human activity and organisations are to be judged from the manner in which they contribute to social solidarity, the State can claim no special position or privileges. It is only one of the various human organisations which are necessary to protect the principle of social solidarity. It can be justified in so far as it defends and furthers the principle of social solidarity. It is nothing more than an organisation of men who issue commands backed by force. If the State acts in a way which promotes social solidarity, it is entitled to be upheld and encouraged. If it does not perform that function, the people have a right to revolt against it and suppress the State itself. The whole idea of sovereignty is meaningless. All power is limited by the test of social solidarity. Every man and every grouping of men is under a duty arising out of the facts of social existence. That duty is to further social solidarity. To quote Duguit: "Man must so act that he does nothing which may injure the social solidarity upon which he depends; and more positively, he must do all which naturally tends to promote social solidarity".

*Implications of Social Solidarity.*—Social solidarity is the touchstone of judging the activities of individuals and all organisations. The State is a human organisation whose duty is to ensure social solidarity. Duguit was in favour of strong checks on the abuse of State power through the establishment of the strict principles of State responsibility. To quote him: "The State is sovereign, but such sovereignty has its limits. The foundation for and the determination of these limitations are found, according to the individualistic doctrine, in the existence of the natural rights of the individual anterior to the State, which the latter must respect and guarantee, but to which it can add limitations to the extent necessary to protect the rights of all". Again, "either the autonomy of the individual comes to limit the power of the State, to determine the extent of the restrictions which it can bring to bear upon the individual activity of each in which case the State ceases to be sovereign, since there is a will other than its own which comes to determine the limitations upon the manifestations of its own will, and so the sovereignty of the State disappears."

Duguit's disbelief in an all-powerful State, combined with his belief in the greatest possible division of labour, leads him to put much stress upon decentralisation and group government. The different classes cooperate with each other and defend individuals belonging to them against the excessive claims of other classes as well as against the arbitrary actions of the central power.

Another implication of social solidarity is his rejection of the intervention of the State as the decisive factor in turning a social into a legal norm. The conclusions of Duguit in this connection resemble very much those of the historical and some of the sociological theories. He writes: "But it is not the intervention which gives the character of a juridical norm to the rule; it would be powerless to prove it if the rule did not already possess it itself. An economic or moral rule becomes a juridical norm when there has penetrated into the consciousness of the mass of individuals composing a given social group, the notion that the group itself, or those in it who constitute the greatest force, can intervene to repress violation of this rule. In other terms, a rule of law exists whenever the mass of individuals composing the group understands and admits that a reaction against the violation of the rule can be socially organised."

Another implication of social solidarity is that law is a spontaneous product of individual consciousness, inspired at the same time by social necessity and the sentiment of justice. This and only this can be the norm of law. That being so, legislation can only be conceived of as a means of expression of the rules of law. The legislator does not create it; he defines it. Legislation imposes itself only in proportion as it is in conformity with this rule. Obedience is not owed to laws as such but only to those laws that give expression to or put into practice a juridical norm. Likewise, Duguit does not conceive of justice as a rational, absolute idea, revealed by reason. It is a sentiment belonging to human nature. The activity of a man is always dominated by the double sentiment of his social character and his individual autonomy. That is the sentiment of justice. Every act which attacks it directly, attacks at the same time social solidarity and is contrary to fundamental social norm.

Another implication is the denial by Duguit of any distinction

between private and public law. According to him, both must serve the same end of social solidarity. There is no difference in their nature. Such a division will elevate the State above the rest of the society which is not accepted by Duguit. The concept of public service unsettles the concept of sovereignty as the foundation of public law. The position of Duguit in this respect is very much akin to Kelsen as both of them have shown deep distrust in the arbitrariness of authority disguised under the special status of public law and both have deprecated the distinction. There is another way where Duguit seems to follow Kelsen in his rejection of the concept of private rights. In his view, the idea of social function "crowds out" the concept of subjective right. The necessity of individual rights disappears with the absence of anyone that can and must exercise it. As all the governors and the governed cooperate for the common end by discharging certain functions, the concept of subjective rights either of the State or of the individual becomes superfluous. According to Duguit: "The only right which any man can possess is the right always to do his duty."

Individuals working in any capacity are parts of the same social organism and each is to play his part in the furtherance of the same end of social solidarity. The essence of law is duty.

Prof. Dias points out that while the interdependence of man is a fact, "social solidarity" is an ideal. In practice it becomes a matter of personal evaluation when the question to be decided is whether a given course of conduct is conducive to social solidarity or not. The question is whether a law imposing or forbidding racial segregation promotes social solidarity or not. The view of Dias is that it is difficult to see how this question can be answered objectively and otherwise than in the light of political, religious and moral evaluations. Another question is whose evaluation of social solidarity is to prevail. There is evidence that the forces of social disruption are as potent as those of solidarity. The view of Dias is that Duguit fell into the error of enlarging a limited truth into an absolute.

The view of Duguit is that a law which does not stand the test of social solidarity is not a valid law. He denies that statutes

and decisions make law in themselves. There are three formative laws, namely, respect for property, freedom of contract and liability only for fault. The precepts of positive law should conform to these formative laws, and they only achieve validity when received and approved by the mass of public opinion. "A rule of law exists whenever the mass of individuals composing the group understands and admits that a reaction against the violation of the rule can be socially organised". Public opinion is thus the expression of the social solidarity principle by which the validity of law should be judged. Dias points out that the vagueness and unsatisfactory nature of mass opinion are obvious and it is difficult to say how that is to be discovered. Situations very frequently arise as to which no particular feeling exists and others as to which opinion is divided. It is unrealistic to suggest that a court will, or will be allowed to, decline to receive an enactment as law because it can be shown that public opinion does not subscribe to it. (*Jurisprudence*, pp. 607-8)

*Criticism.*—Though Duguit is a positivist and excludes all metaphysical considerations from law, his principle of social solidarity itself is a natural law ideal. His special emphasis is on the valuation of law on a social plan. The facts of social life to which he confines his study, tend to become a theory of 'justice' in practice. Duguit wants to establish an absolute and uncontested rule of law. Like 'natural law' theories, he establishes the standard of social solidarity to which all positive law must conform. It is nothing but natural law in a different form. It has rightly been said that Duguit "pushed natural law out through the door and let it come by the window".

If a question arises whether a particular act or rule furthers social solidarity or not, the matter has to be decided by judges and that might prove to be dangerous. Judges have their weaknesses and limitations and that may lead to judicial despotism.

The idea of social solidarity can be differently interpreted and used to serve divergent purposes and actually that has been done. Duguit's insistence on the identity of interests of the various groups in society and the minimisation of conflicts was used by the Fascists to serve an absolutely different end. They

used it to glorify the State by giving it a towering personality. They also used it to suppress trade unions. Duguit himself would not have approved those interpretations. The jurists of the Soviet Union have used the theory of Duguit to establish that individuals have no rights. His denial of the distinction between private and public law, his idea of minimising State intervention were welcomed by the jurists of the Soviet Union

While defining law, Duguit confused it with what law ought to be. His view was that if law does not further social solidarity, it is not law at all. His definition of law confused it as was done by the advocates of natural law

Duguit advocated the minimisation of State intervention at a time when the State was becoming all important. He overlooked the fact that the social problems of a modern community were becoming complex and could be tackled only by the State. With the development of society, the sphere of State activity has expanded tremendously and instead of the State withering away, it has become stronger.

Duguit was inconsistent at many places. On the one hand, he expressed faith in the biological evolution of society. On the other hand, he attacked the idea of collective personality. He denied any personality to State or groups distinct from the individuals who constitute it.

After recognising the services of Duguit to jurisprudence by emphasizing that law is essentially the product of social forces, Prof. Allen writes: "But he goes far beyond any sociological theory of law which had yet been advanced when he attempts to evaporate all ethical content out of law To banish the notion of right wholly from law, as M. Duguit seeks to do, is to make it meaningless and to revolt an instinct which is deepseated in human nature."

Paton points out that solidarity may be filled with any content we desire. It is not an end in itself but a mere means to the purposes which man wishes to achieve. Men may join together to collect the scalps of their neighbours or to preserve the peace of the world. A community of masters and slaves may have greater

cohesion than a democracy. While law is based on facts, it is created only when men use their wills to choose between one set of facts and another. Rules are created because men say that "this is better than that" and because they agree to place their wills at the service of the chosen end. No theory is satisfactory which divorces law from the wills of men.

*Contribution of Duguit.*—In spite of various defects in his theory, the contribution and influence of Duguit were great. His approach was comprehensive and sincere. Though his theory ultimately became a theory of natural law or a theory of justice, the idea of justice we find in him is in perfectly social terms and was derived from social facts. He shaped a theory of justice out of the doctrines of sociology. Though proceeding from different premises, many later jurists reached similar conclusions as Duguit had reached, particularly about the State, rights and public and private law. Both the National Socialists and the Soviet jurists adopted many of the principles from the theory of Duguit, but they interpreted it in such a way as to suit their purpose or took only such part of the theory which supported their activities. Inspired by Duguit's emphasis on the importance of "group", many later jurists like Hauriou and Renard propounded the "institutional theory". Though Duguit's theory holds good on hardly any point, he is given the credit for his original and comprehensive approach which inspired many jurists to propound new theories.

Prof. Dias writes thus about Duguit: "His functional approach to laws, his denial of the distinction between public and private law and his advocacy of a form of the 'withering away' of centralised authority and its replacement by a decentralised 'administration of things' had some attraction to the early Marxist interpreters. His work had influence in another direction also. The emphasis that he placed on the importance of the group, coupled with advances in later sociological thought shifted the focus of attention to group behaviour" (*Jurisprudence*, p. 609).

The view of Gurvitch is that the great merit of Duguit lies more in pointing out the existence of certain problems which had escaped Durkheim than in having solved them. Basically, he continued and applied to his time the researches of the doctrinaires

who pointed out the existence of a jural framework of society opposed to the State. His contribution to the sociology of law lies rather in his struggle against certain consecrated dogmas and in his description of the recent transformation of law than in a methodical study of the problem. Duguit's work in jurisprudence influenced and stimulated different movements of thought.

### *Gierke (1841-1921)*

Gierke, a German jurist, was one of the most important original thinkers in the early fields of sociological jurisprudence. According to him, the reality of social control lies in the way in which groups within society organise themselves. He proceeded to trace the progress of social and legal development in the form of the history of the law and practice of associations. He propounded a classification of associations on the following lines: firstly, he contrasts collective persons organised on a territorial scheme among which is numbered the State, with those organised on a family or extra-territorial scheme. Secondly, he contrasts associations based on the idea of fraternal collaboration with those which are based on the idea of domination. In his own period, Gierke felt that the collaborative principle had prevailed and the State encouraged the growth of independent collaborative organisations within its own framework.

Gierke represents the final reaction against 18th century individualism. He was the pioneer of the modern approach to society. His doctrine of the *real personality and will of the group* was a fascinating anticipation of the lines of enquiry of modern psychology. He himself never found it easy to reconcile his doctrine of the independence of autonomous corporate bodies with the Supreme corporate power of the State. His writings are an illustration of the new organic approach to society. Though he himself disclaimed the use of the biological term in connection with corporate associations, his work runs on the lines parallel to those of Comte and Spencer.

### *Hauriou (1856-1929)*

The theory of Hauriou is best appreciated in conjunction with the theories of Gierke and Duguit. It has the following three essential elements:

- (i) The idea of an undertaking or enterprise which is realised and persists juridically in a social *milieu*.
- (ii) For the realisation of this idea, a power is organised which gives it organs.
- (iii) Between the members of the social group interested in the realisation of the idea, manifestations of communion arise which are directed by the organs and regulated by rules of procedure

According to Hauriou, there are two kinds of institutions: "*institutions-personnes*" (groups of human beings) and "*institutions-choses*" (institution-things, e. g. rules of law, marriage). However, he developed seriously only the former type. He approached the problem of the institution as a sociologist. He saw in it the synthesis of subjective will and objective reality. To him, the institution was not only an analysis of social facts but also a juristic ideal as the best combination of sovereignty and liberty. In the institution, individuals communicate through combined action. The institution becomes something more than an intellectual creation when individuals communicate through combined action. From the three elements which constitute the essence of an institution results the personification of an organised group bent on the realisation of a common purpose. The objective reality of the institution is not only a social reality, but also the source of legal personality. Hauriou considers the formal incorporation of an institution as of subordinate importance. Through the participation of all its members in the government of the institution and the consequent passing of the idea of the institution into the consciousness of all its members, moral personality is achieved.

Hauriou was a pluralist. He did not integrate the *institution* in the State as the highest type of institution.

Hauriou repudiated the organic theory, but his definition of an institution as a social organism in which those who have the power have to submit to the idea which inspires the enterprise is, in fact, an organic theory. Whether the institution is a commercial company, a political party, a trade union or the State, the myth of its super-personal purpose demands obedience and subordination.



The institution is the medium through which individual activity serving a higher cause fulfils the divine purpose.

The theories of Spencer, Gierke, Duguit and Hauriou all lead to a similar result which is the subordination of the individual to a new social discipline and service to a collective. All these jurists were strongly inspired by the idea of corporate autonomy. In different ways they disliked the idea of a State-Leviathan. However, their theories were fated to lead to a new State despotism which cunningly used the idea of devotion to a collective for the glorification of individual power.

Hauriou took account of only those ideas which are innate in men as social animals and in the very nature of social life, i.e., principles of constitution and regulation without which no kind of group activity would be possible.

Hauriou's theory about the formation and development of institutions, their personality and their relations with the State etc. throw light on the sociological aspect of law.

#### *Max Weber (1864-1920)*

Max Weber started his career as a lawyer, both as a teacher and practitioner, but social science and economics became his dominating interest.

Weber's *Sociology of Law* has for its main theme the analysis of the transformation of law from a "charismatic" finding of a law to a state of rationalisation. This transformation is followed up in various legal phenomena. In the gradual distinction of public from private law, in the evolution from the decision of individual cases to general principles and eventually a systematisation of law, in the development from the early formal status-contract to the elastic and formless purpose-contract, from the autonomous legal personality of the Middle Ages to the modern State monopoly of the creation of legal personality. All these legal developments are closely linked with social, political and economic factors. Thus, a development of an exchange economy with its increasing use of money leads to the development of modern contract with its free assignability. The most interesting part of Weber's analysis is concerned with the influence of legal

professionalism and of different forms of political government on the development of law.

Weber has made a valuable contribution to jurisprudence and earned for himself a place among the sociological jurists. His historical method links him with Sir Henry Maine but the principles which he deduces from the course of development is Marxian

*Rudolf von Ihering (1818-1898)*

Ihering was born in 1818 at Aurich in East Friesland. He became a teacher of Roman Law and published his *magnum opus* from 1852 to 1865 in four volumes under the title *The Spirit of the Roman Law in the Various Stages of Its Development*. This publication was translated into many European languages and that brought him recognition. In 1867, he became Professor in the University of Vienna. The busy life of Vienna interfered with his academic work and therefore he joined the Gottingen University where he spent the last decades of his life in pioneering a new school of jurisprudential thought

Ihering developed his legal philosophy through an intensive study of the spirit of Roman law. Reflections on the evolution of Roman law and the genius of Roman jurisprudence led him to detest more and more what he called the jurisprudence of concepts. The study of Roman law taught him that its wisdom lay not so much in the logical refinement of concepts as in the moulding of concepts to serve social purposes. Through his studies, Ihering became aware of the paramount necessity for law to serve social purposes. That made Ihering a utilitarian. The philosophical basis of his utilitarianism is the recognition of *purpose* as the universal principle of the world, embracing all creation. The purpose of human action is not the act itself but the satisfaction derived from it. The debtor pays his debt in order to free himself from it.

According to Ihering, the *purpose of law* is the protection of interests. He defined interest as the pursuit of pleasure and avoidance of pain. Individual interest is made partly of a social purpose by connecting one's own purpose with the interests of other people. By converging interests for the same purpose, cooperation

is brought about and commerce, society and the State result from it.

The problem before Ihering was to reconcile individual and collective interests and he did so by means of the principle of levers of social motion. In those levers, he combined egoistic and altruistic motives. The existence of society is made possible by a combination of the two. The egoistic levers are reward and coercion. The desire for reward produces commerce and the threat of coercion makes law or State possible. Ihering joins those to whom coercion is an essential element of law and State alike. The altruistic or moral levers of social motion are the feelings of duty and love. The four combine to make society possible. The object of society is to secure the satisfaction of human wants.

Ihering divides into the following three categories the totality of human wants :

- (i) Extra-legal (solely belonging to nature) human wants offered to man by nature with or without effort on his part, e.g., the produce of soil
- (ii) Mixed-legal human wants, i.e., conditions of life exclusive to man. In this category are the four fundamental conditions of social life viz., preservation of life, reproduction of life, labour and trade. These are specific aspects of social life, but independent of legal coercion.
- (iii) The purely legal conditions which depend entirely on legal command, such as the command to pay debts or taxes. No legislation is needed for such matters as eating and drinking, or the reproduction of the species.

The realisation of the social purpose, i.e., the conditions of social existence, may be pursued by morality, ethics or law. The characteristic approach of law is by means of the power of the State which exercises external coercion.

According to Ihering, the content of law not only may but must be infinitely various. Purpose is a relative standard and hence law must adapt its regulations to the varying conditions of the people, according to the degree of their civilisation and the

needs of the time. Ihering opposed the idea of natural law as giving certain permanent and universally valid contents to law.

If law is coercion, the question arises how it can coincide with the pursuit of individual interest. The reply of Ihering is that the basis of all legal measure is undoubtedly man, whether the measures belong to private, criminal or public law. Social life adds to man as a simple being, man as a social being, as a member of a higher unit, e.g., State, church or association. The jurist must conceive a higher legal subject, society, as standing above the particular individual. The individual is enabled to desire the common interest, in addition to his own. The law never secures the good of the individual as an end in itself, but only as a means to the end of securing the good of society. Ihering was opposed to Kant's atomistic conception of society.

According to Ihering, property exists not solely for the owners but also for society. Law must try to reconcile the interest of the owner with that of society. In this way, it justifies expropriation or legal restriction imposed upon the exercise of individual property rights. Expropriation solves the problem of harmonising the interests of society with those of the owner. Ihering was the first jurist who developed a theory of balance of purposes or interests. His classification of three main groups of interests—those of the individual, the State and the society, was later on developed by Roscoe Pound.

According to Ihering: "Law is the sum of the conditions of social life in the widest sense of the term as secured by the power of the State through the means of external compulsion."

In *The Struggle for Law* published in 1872, Ihering developed the thesis that *the origin of law is to be found in social struggles*. To quote him: "The birth of law, like that of men, has been uniformly attended by the violent throes of childbirth".

In *Law as a Means to an End*, the first volume of which appeared in 1877, Ihering showed that law is a system of reconciling conflicting interests. To quote him: "Purpose is the creator of the entire law." Referring to the philosophical school, he declared: "You might as well hope to move a loaded wagon from its

place by means of a lecture on the theory of motion as the human will by means of the categorical imperative. *The real force which moves the human will is interest.*" The doctrine of the historical school that law evolves spontaneously like language was attacked by Ihering. He wrote pungently that according to the historical school, the Roman law of debtor slavery grew in the same way as "the grammatical rule that *cum* governs the ablative."

He was modern in the sense that he recognised the coercive character of law and thus could meet the positivists on common ground. His approach to law is not a denial of the efficacy of analytical jurisprudence but a convincing demonstration of its inadequacy. He did not claim that he was solving the problems of law and society. His task was merely to reconcile the conflicting interests although he did not tell us in which direction that was to be done. Although he drew our attention to the problems of society, he did not solve them.

According to Ihering, law is not the only means to control the social organism. It alone cannot protect and further all the social purposes. Law is only one factor among many others. There are some conditions of social life for which no intervention by law is needed. There are some others where only part intervention is made by law. However, there are some conditions of social life which are secured exclusively by law.

According to Ihering: "Human conduct is determined not by a 'because' but by a 'for' by a purpose to be effected, the 'for' is as indispensable for the will as is the 'because' for the stone. The stone cannot move without a cause, no more can the will operate without a 'purpose'."

*Criticism*: Dr. Friedmann writes that with Ihering, utilitarianism ceased to mean the pursuit of individual pleasure and became the balance between individual and communal interests. In that respect, Ihering's system represented a further step away from Bentham, in the direction shown by Mill. Through the development of the idea of balance as the purpose of law, *Ihering became the father of modern sociological jurisprudence.* He prepared the more elastic legal technique required to meet new and changing legal problems by his fight against the "Jurisprudence of Concepts".

Moreover, his insistence that law is realised through struggle and self-assertion was opposed to the romantic conception of an unconscious manifestation of the Volkgeist through the law. By insisting at the same time on coercion as the characteristic of law and making the power of the State the instrument of the law, Ihering created the essential foundations of a modern jurisprudence, suitable for the practical lawyer, because it was in much closer contact with the social realities of the 19th and 20th centuries than Kant's idealism or the romanticism of Savigny.

Prof. J. Stone writes that "Ihering had drunk deeply from the orthodox 19th century juristic springs. When he attacked his former teachers, he did so in terms which they could not but understand. His iconoclasm operated from within the juristic fold, rejecting the absolutism of *a priori* theories of justice and individualism of both the Kantians and Benthamites. As a result, his criticism entered the mainstream of juristic thought and all who have followed him had to reckon with his achievement." (*The Province and Function of Law*, p. 311)

Ihering's theory of justice was generally labelled as social utilitarian. He pressed the "fundamental idea that the highest principle of classification from the philosophical point of view is the subject for whose sake the law is made; and that in addition to the individual and the State, society also, in the narrower sense, must be recognised as a subject." Looked at from the viewpoint of the subject, this was an assertion of the primacy of interests or claims. Ihering drew the attention of those who were seeking an ideal of law in some absolute *a priori* concepts, to the relative elements of all theories of justice.

One criticism of Ihering is that he built his system upon an assumed egocentric individual who gradually developed into the socially-minded member of the group and in the modern sense such sharp opposition of individual and society is false

Ihering did not provide us with a criterion of justice at all. While he drew attention to the conflicting purposes which lie behind law, he gave no satisfactory guide for deciding whether this compromise embodied in the law is a just one or how a more just one could be attained. To say that individual purposes must

give way to social purposes, is no answer at all. The question is how much way they should give. It is also difficult to distinguish social interests from individual interests.

According to many critics, law protects 'will' and not purpose. However, Korkunov has very stoutly defended Ihering's theory of purpose by presenting a number of illustrations to show that law protects purpose and not will.

*His Contribution.*—As regards the contribution of Ihering, he rendered invaluable services to the science of jurisprudence. He was an investigator of ancient law, a philologist and an anthropologist and made study of various legal systems by the comparative method. He traced the evolutionary character of law and declared that law develops by conscious efforts. He launched a vigorous attack on Savigny's historical theory, philosophical theory and natural law theory. In the fulfilment of social purposes, he found the fruition of individual purposes which later on became the motto of the socialist States.

By pointing out the coercive character of law, by indicating that law has only a relative value, by evaluating it with the social context and by speaking of it as an instrument to secure social purpose, Ihering laid the foundations of sociological jurisprudence. One finds in him all the chief traits of sociological jurisprudence.

J. Stone writes that to admit the ultimate failure of Ihering's social utilitarianism is not to deny its significance. Fundamentally, that significance lay in powerfully drawing attention to the stuff to be weighed in the scales of justice. He did for German and perhaps for continental thought what Bentham and his followers had already done for English thought. He did even more. He insisted on the relativism of justice which Bentham's calculus of pains and pleasures tended in practice to obscure. He insisted that there were some important interests to which the law must have regard which cannot be easily fitted into a calculus of pains and pleasures. He insisted that thought in terms of society naturally finds room for the individual, but thought in terms of the individual tends to overlook those interests which are not easily identifiable in terms of the individual. (*The Province and Function of Law*, p. 313).

Ihering inspired the sociological school of jurisprudence. Prince Leo Gallitzin, a Russian prince who was one of his disciples, referred to Ihering as the Prometheus who had brought the light of jurisprudence to mankind. Ihering's work was taken up by his disciple, Eugen Ehrlich. Earnest Fuchs, leader of the German free law school, derived his inspiration from Ihering. The American School of Sociological Jurisprudence was also influenced by the works of Ihering.

*Eugen Ehrlich (1862-1922)*

Ehrlich was born in 1862 at Czernowitz in the Duchy of Bukowina which at that time was a part of Austria-Hungary. He became Professor of Roman Law at the University of Czernowitz. He was primarily concerned with the social basis of law. According to him, law is derived from social facts and depends not on State authority but on social compulsion. Law differs little from other forms of social compulsion and the State is one among many associations. The real source of law is not statutes but the activities of society itself. To quote him: "The centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself". There is a "living law" underlying the formal rules of the legal system and it is the task of the judge and jurist to integrate these two types of laws. Commercial law, as embodied in statutes and cases, involves a constant attempt to try to keep up with commercial usage, for the "centre of legal gravity lies in society itself." Hence, great emphasis is placed on fact-studies, as against analytical jurisprudence, in exploring the real foundations of legal rules, their scope and meaning and potential development.

The view of Ehrlich was that laws found in formal legal sources such as statutes and decided cases, give only an inadequate picture of what really goes on in a community. He drew a distinction between norms of decision and norms of conduct. There will always be an inevitable gap between the norms of formal law and those of actual behaviour. The "living law" of society has to be sought outside the confines of formal legal material. It is to be sought in society itself. One learns little of the living law in factories by reading only the Factories Acts, the enactments and the common law relating to master and servant, trade unions etc



One has to go to a factory if one is to observe how far the formal law is followed, modified, ignored and supplemented. Only a very small fraction of social life comes before courts and even then it usually represents some form of breakdown of social life.

According to Ehrlich, certain facts underlie all laws. Those are usage, domination, possession and declaration of will. Propositions of law with reference to them arise in three ways, by endeavouring to give effect to the relations they create, by controlling or invalidating them or by attaching consequences to them. A formal concept of law consists of the synthesis of generalisations constructed from the various propositions of law. According to Ehrlich, 'living law' is to be discovered from judicial decisions, modern business documents against which judicial decisions have to be checked and observation of people by living among them and noting their behaviour.

According to Ehrlich, a statute which is habitually disregarded is no part of the living law. Enforcement by the State is not the distinction between formal and living law. The difference lies in social psychology. Some types of rules evoke different feelings from others. There are many reasons why a person obeys even a legal rule other than fear of State enforced sanction. The characteristic of formal rules lies in the kind of feelings they arouse by virtue of their generality and social significance. Different societies and even the same society at different times, have had different feelings about what is socially important, the line between legal and moral and social rules has constantly shifted.

According to Ehrlich, the real law of the community is not to be found in the traditional formal legal sources. The norms governing life in society are imperfectly and partially reflected in the formal law of that society. A commercial usage becomes established as it is convenient and efficient. With the passage of time, it is recognised by courts and incorporated into contracts. Ultimately, it is given a statutory form as in the Sale of Goods Act, 1893. As fresh commercial usages grow up, those are also ultimately incorporated in the law of the country. The net result is that the formal law can never catch up with the 'living law'. There is always a gap between what the law says about a given topic and the way in which people actually behave in the context

of that topic. In certain cases, law contradicts the practice of that topic. Sir Carleton Allen writes: "The London Stock Exchange, despite the express provisions of Leeman's Act, persistently refuses to specify the serial numbers of the shares in a contract for the sale of banking shares; underwriters constantly disregard Section 4 of the Marine Insurance Act, 1906 which provides that every insurer of a cargo or bottom must have an insurable interest in the same" Likewise, it is provided in the Moneylenders Act, 1900 that if interest is excessive and the transaction is harsh and unconscionable, the borrower may obtain relief "When it is found that the interest charged exceeds the rate of 48% per annum, there is a presumption that the interest charged is excessive and that the transaction is harsh and unconscionable." In spite of this, there are moneylenders who charge interest @ 48% per annum and although thousands of transactions take place on that basis, no cases are brought before the courts by the borrowers. Obviously, the practice differs from law. Likewise, a large number of technical assaults and batteries are committed, but those are not brought to the notice of courts. In actual practice, the police also do not prosecute all those who are guilty of various offences, particularly when it is considered inexpedient to do so. The conclusion of Ehrlich is that if we want to know the living law of a society, we cannot confine ourselves to the formal legal material but we have to go beyond that in order to find out how people actually live in society.

Ehrlich does not find any difference between law and custom. It appears to him that both of them have the same sanction in the form of social pressure. Whether the norm is a statute or the practice of a group, the reason for its observance is exactly the same and that is the communal urge which arises from the facts of social life. To quote Ehrlich. "The individual is never actually an isolated individual; he is enrolled, placed, embedded, wedged into so many associations that existence outside of these would be unendurable."

The view of Ehrlich was that law which is not habitually observed is not a part of the living law of the community. His calculation was that about one-third of the sections of the Austrian Civil Code had no influence whatsoever upon the life of the people.

According to Ehrlich, the traditional scope of jurisprudence was hopelessly narrow and the same must be enlarged if the subject is to have contact with reality. The jurists should study not only the formal legal system but also the rest of the living law. He must see to it that the formal law keeps pace with the way in which people actually lived. To quote Ehrlich: "The law does not consist of legal propositions but of legal institutions. In order to be able to state the sources of the law, one must be able to tell how the State, the church, the commune, the family, the contract, the inheritance came into being, how they change and develop." If one were to follow the process suggested by Ehrlich, a lifetime would be required to deal with one Act. Without "disrespect to the labours of a very learned, sincere and original jurist", Allen has attempted to term this kind of project as "megalomaniac jurisprudence". However, some limit has to be drawn because otherwise jurisprudence will dissipate its energy over too wide an area.

Ehrlich advised the jurists to come out of their ivory tower of analytical jurisprudence and walk on the fields of actual life where law must work and be tested. His work was undoubtedly stimulating and beneficial. However, Ehrlich did not attach sufficient importance to the way in which formal law itself influences and reforms the practices of society. The view of Ehrlich that formal law merely confirms the real norms of social law tends to give to conscious law-making only a rubber stamp efficacy and deprives it of its creative power. It is true that reforming legislation is very often the formal expression of a public feeling, but there are cases where legislation imposes a novel idea of public opinion and it is only in course of time that public opinion accepts it and approves of it. This aspect of the matter was not given due recognition by Ehrlich.

The central point in Ehrlich's approach is his minimisation of the differences between law and other norms of social compulsion. The difference is relative and smaller than usually asserted because the essential compulsion behind legal and social norms is social compulsion and not State authority. Tribal allegiance, family and religion provide motives of obedience to social norms, including most legal norms. Many legal norms never find expression

in legal provisions even in developed systems. Law is something much wider than legal regulation. The State is only one of a number of legal associations. The State, as the principal source of law, is to Ehrlich historically a much later development. It remains at all times essentially an organ of society.

Ehrlich distinguishes between static and dynamic principles of justice. Such institutions as contract, succession, the interest in one's own labour, have certain ideal forms. Justice demands the perfect economic contract or the legal prohibition to enrich oneself by the labour of someone else.

Dr Friedmann points out that Ehrlich's work is full of stimulating suggestions for a scientific approach to law which relates the law more closely to the life of society. It has played a leading part in the reaction of legal thinking towards the turn of the century against the surfeit of analytical jurisprudence which had characterised legal thinking of the preceding generation. The practical impact of his teaching was the stimulus given to fact-study in law. His approach was more scientific and comprehensive. He suggested the study of law in its social context and emphasized its close relation with the life of society. Though Ehrlich appears to have adopted Savigny's line of thought, he differs from him in many respects. In Savigny's view, law is tied to the primitive consciousness of the people. However, Ehrlich locates law in the present-day institutions of society. While legal provisions were addressed to courts and administrative officials, there is living law which dominates life even though it may not have been formulated as living proposition. Ehrlich's approach is more practical and purposeful. He concentrates more on the present than on the past law. He emphasises the social function of law. In making and administering law, the requirements of society should be taken into consideration.

The view of Dias is that the work of Ehrlich was a powerful influence in inducing jurists to abandon purely abstract preoccupations and to concern themselves with the problems and facts of social life. (*Jurisprudence*, p 590).

*Criticism of Ehrlich:* Dr. Friedmann refers to three main weaknesses in the work of Ehrlich. In the first place, Ehrlich gives no clear criterion by which to distinguish a legal norm from

any other social norm. The interchangeability does not diminish the need for a clear test of distinction. Ehrlich's sociology of law is always on the point of becoming a general sociology. Secondly, Ehrlich confuses the position of custom as a "source" of law with custom as a type of law. In primitive society as in the international law of our time, custom prevails both as source of law and the chief type of law. In modern society, it is still important in the first, but less and less important in the second, role. Modern society demands articulate laws made by a definite law-giver. Thirdly, Ehrlich refuses to follow up the logic of his own distinction between specific legal State norms and legal norms where the State merely adds sanction to social facts. As modern social conditions demand more and more active control, the State extends its purposes. Consequently, custom recedes before deliberately made law, mainly statute and decree. At the same time, law emanating from central authority as often moulds social habits as it is moulded itself. (*Legal Theory*, pp 202-3).

Dias also points out certain drawbacks in Ehrlich's philosophy. The difference between formal and living law is necessary and important, but there is some danger of a merely verbal discussion as to whether both should be called law, or only one, and if so which. He deprived formal law of any creative activity and gave it too much the appearance of trailing in the wake of social developments. It is true that reforming legislation is sometimes the formal expression of a tide of public feeling, but it is also true that many norms of behaviour have been given shape and direction by the constant enforcement of law. Ehrlich's distinction between norms of decision and norms of behaviour is important, but he failed to emphasise sufficiently their mutual interaction. Ehrlich's contentions were somewhat outmoded even when he propounded them. State organisation is now and has been for a long time playing an ever increasing part in the regulation of social life. It is not merely ancillary to the living law. It occupies a place of transcendent importance. The picture drawn by Ehrlich was truer of the past than of today and it was ceasing to be true even in his own day. His conception of jurisprudence could make it unwieldy and amorphous. The way in which Ehrlich proposed to conduct the study of society would all but

submerge the significance of laws and might lead to the death of jurisprudence as a subject. (*Jurisprudence*, p. 590).

The view of Lord Lloyd is that Ehrlich unduly belittled the primary role of legislation in creating new law, both in the public and private sector. A grasp of underlying social phenomena may not in itself point the way to appropriate solutions, either in new legislation or decisions of the courts. The legal process may need to be invoked as in itself an educative factor, as, for instance, in the attempt in the United States to impose desegregation by judicial decree and so set the educative forces in motion which might ultimately produce a change in the social climate, rather than yielding to existing social pressures. The same is the case with such reforms as town-planning or the abolition of capital punishment which may have to be forced by a progressive minority upon a recalcitrant majority for the time being. (*Introduction to Jurisprudence*, p. 355).

According to Dr. Gurvitch, the essential defect in the philosophy of Ehrlich is the total lack of micro-sociological and differential analysis, that is to say, any accounting for the forms of sociality and jural types of groupings. Ehrlich's sociological and jural pluralism is an exclusively vertical one. It leads him to confuse under the term "law of society" a series of different kinds of law and this confusion is repeated with respect to rules of decision and abstract propositions. According to him, whatever is institutional or spontaneous in law comes from society opposed to State and has the character of internal law of association. Contractual law, law of property and law of unilateral domination are only masked forms of law of society and the objective and spontaneous order of individual law does not exist. At the same time, the State is seen only under the form of abstract legal propositions as though there were not levels of depth within the order of the State and as though there did not exist a spontaneous political union distinct from other spontaneous unions. The absence of micro-sociology and jural typology of groupings leads to sharply monastic conceptions. The law of society is artificially impoverished by being confined solely to the sphere of the spontaneous, as though it did not have its own abstract propositions in autono-

mous statutes of groups and its own rules of decision elaborated in the functioning of Boards of Arbitration and similar bodies.

### *Roscoe Pound (1870-1964)*

In the words of Dr. Gurvitch, the sociology of law in the United States had its most elaborate and detailed, its most broadly conceived and subtle, expression in the rich scientific productions of Dean Pound, the unchallenged chief of the school of sociological jurisprudence. His thought was formed by a constant confrontation of sociological problems, philosophical problems, problems of legal history and problems of the work of American courts. This multiplicity of centres of interest and of points of departure aided Pound to broaden and clarify the very vast perspective of legal sociology and to develop gradually its different aspects.

The view of Sir C.K. Allen is that Pound was "a moderate of moderates—a relativist with a strong conviction of the provisional nature of all legal creeds and expedients". (*Law in the Making*, p. 34). It is not correct to describe his attitude as purely pragmatic or utilitarian. He was not an enemy of abstract philosophy of law. He did not underestimate the part played by speculative idealism in the development of legal institutions. However, he was impressed by certain limitations of legal philosophy which history had constantly illustrated. Philosophical theory is conditioned by the circumstances of time and place. Again and again, whole trends of thought have been coloured by the desire to justify a theory of government, to solve a pressing problem of the government, to resolve doubts created by a phase of social change or to bridge transition from one order of society to another. Though each in its turn has considered itself a decisive revelation of truth, none of them is or can be final. The conclusion is that all juristic truth is relative truth.

The whole trend of Pound's legal philosophy is cautiously experimental—to the point where some may think that it is hesitating and unsatisfying, but there is much warrant in experience for believing that modesty of objective in social experiment is more fruitful in the long run than a vaulting ambition which overlaps itself. Pound's legal philosophy is essentially one of practical compromise.

✓ Roscoe Pound was born in Lincoln, Nebraska. He was devoted to classics and botany in his youth. In 1901, he was appointed an auxiliary judge of the Supreme Court of Nebraska. In 1903, he became Dean of the Law School of the University of Nebraska. He was Dean and Carter Professor of Jurisprudence at the Harvard University from 1916 to 1936. It was from Harvard that he published a series of articles on Sociological Jurisprudence.

Among the advocates of the sociological method, the name of Roscoe Pound stands preeminent. He, more than any other in recent times, was responsible for the growth of the functional attitude in juridical science, the attitude of looking to the working of law rather than to its abstract content and regarding law as a social institution which it should be our endeavour to improve by conscious and intelligent effort along lines which jurists shall determine as the most efficacious for achieving the ends and purposes to be served. In his book *Interpretations of Legal History*, Pound wrote: "Law is the body of knowledge and experience with the aid of which a large part of social engineering is carried on. It is more than a body of rules. It has conceptions and standards for conduct and for decision, but it has also doctrines and modes of professional thought and professional rules of art by which the precepts for conduct and decision are applied and developed and given effect. Like an engineer's formulae, they represent experience, scientific formulations of experience and logical development of the formulations, but also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique."

✓ According to Pound, sociological jurisprudence should ensure that the making, interpretation and application of laws take account of social facts. In order to achieve that end, there should be a factual study of the social effects of legal administration, social investigations as preliminaries to legislation, a constant study of the means for making laws more effective, which involves the study, both psychological and philosophical, of the judicial method, a sociological study of legal history, allowance for the possibility of a just and reasonable solution of individual cases, a ministry of justice in English-speaking countries and the achievement of the purposes of the various laws. This com-



prehensive programme covers every aspect of the social study of laws.

According to Pound, the common law still bears the impress of individual rights. In order to achieve the purposes of the legal order, there has to be a recognition of certain interests, individual, public and social, a definition of the limits within which such interests will be legally recognised and given effect to, and the securing of those interests within the limits as defined. When determining the scope and subject matter of the system, the following five things have to be done: (i) preparation of an inventory of interests, classifying them, (ii) selection of the interests which should be legally recognised, (iii) demarcation of the limits of securing the interests so selected, (iv) consideration of the means whereby laws might secure the interests when those have been acknowledged and delimited, and (v) evolution of the principles of valuation of the interests.

*Theory of Social Engineering* —Pound likened the task of the lawyer to engineering and he repeated that analogy frequently. The aim of social engineering is to build as efficient a structure of society as possible which requires the satisfaction of the maximum wants with the minimum of friction and waste. It involves the balancing of competing interests. For that purpose, interests were defined by Pound as claims or wants or desires (or expectations) which men assert *de facto*, about which law must do something if organised societies are to endure. It is the task of the jurists to assist the court by classifying and expatiating on the interests protected by law. For facilitating the tasks of social engineering, Pound classified the various interests which are to be protected by law under three heads: private interests, public interests and social interests.

(i) *Private Interests*.—The private interests to be protected by law are the individual's interests of personality. These include his physical integrity, reputation, freedom of volition and freedom of conscience. They are safeguarded by the criminal law, law of torts, law of contracts and by limitations upon the powers of the government to interfere in the matter of belief and opinion. Individual's interests in domestic relations include marriage, relations of husband and wife and parents and children and claims to

maintenance. Interests of substance include proprietary rights, inheritance and testamentary succession, occupational freedom, freedom of association, freedom of industry and contract, continuity of employment etc.

(ii) *Public Interests*.—Public interest are claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life. There are two kinds of public interests: interests of the State as a juristic person and interests of the State as a guardian of social interests. They include the integrity, freedom of action and honour of the States's personality, and claims of the politically organised society as a corporation to property acquired and held for corporate purposes.

(iii) *Social Interests*.—Social interests are claims or demands or desires thought of in terms of social life and generalised as claims of the social group. Social interests are said to include (a) social interest in the general security, (b) social interest in the security of social institutions, (c) social interest in general morals, (d) social interest in the conservation of social resources, (e) social interest in general progress and (f) social interest in individual life.

✓ Social interest in the general security embraces those branches of the law which relate to general safety, general health, peace and order, security of acquisitions and security of transactions.

✓ Social interest in the security of social institutions comprises domestic institutions, religious institutions, political institutions and economic institutions. Divorce legislation may be adduced as an example of the conflict between the social interests in the security of the institution of marriage and the individual interests of the unhappy spouses. There is tension between the individual interest in religious freedom and the social interest in preserving the dominance of an established church.

✓ Social interest in general morals covers a variety of laws, e.g., laws dealing with prostitution, drunkenness and gambling.

✓ Social interest in the conservation of social resources covers conservation of social resources and protection and training of dependents and defectives, i.e., conservation of human resources.

Social interest in general progress has three aspects: economic progress, political progress and cultural progress. Economic progress covers freedom of use and sale of property, free trade, free industry and encouragement of inventions by the grant of patents. Political progress covers free speech and free association. Cultural progress covers free science, free letters, free arts, promotion of education and learning and aesthetics.

Social interest in individual life involves self-assertion, opportunity and conditions of life.

The problem which juridical science faces is the evaluation and balancing of these interests. For facilitating that process, Pound provided what he called the *jural postulates of civilised society*. In 1919, he summarised those postulates as follows: Every individual in civilised society must be able to take it for granted that—

- (i) he can appropriate for his own use what he has created by his own labour and what he has acquired under the existing economic order;
- (ii) that others will not commit any intentional aggression upon him;
- (iii) that others will act with due care and will not cast upon him an unreasonable risk of injury;
- (iv) that the people with whom he deals will carry out their undertakings and act in good faith.

In 1942, Pound added to that list the following three new postulates: (i) that he will have security as a job-holder; (ii) that society will bear the burden of supporting him when he becomes aged; (iii) that society as a whole will bear the risk of unforeseen misfortunes such as disablement.

The jural postulates are to be applied both by the legislators and the judges for evaluating and balancing the various interests and harmonising them. Justice Cardozo writes: "If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge from experience and study and reflection, in brief from life itself."

Criticism.—Pound's theory of social engineering has been criticised on various grounds. It is contended that the classification

- of interests by Pound is in the nature of a catalogue to which additions and changes have constantly to be made and which is neutral as regards the relative value and priority of the interests enumerated. As soon as interests are ranked in a specific order or given any appearance of exclusiveness or permanence, they lose their character as instruments of social engineering and become political manifesto. Pound himself has inserted a certain evaluation by describing the interest in individual life as the most important of all. However, there is a danger of an implicit evaluation in the grading of interests as either individual, public or social.
- What is an individual and what is a social interest is itself a matter of changing political conceptions. Many interests come under different categories. The protection of inventions by exclusive patent may be an individual interest of personality as well as a social interest in economic progress. It is not only the enumeration of interests as such but also their respective weight which is a matter of changing political and social philosophies. Pound's four legal policies for the protection of general progress can be hotly contested today both in practice and theory. Freedom of property is subject to increasing limitations according to the prevailing social philosophy ranging from the transfer of means of production to the community to prevention of the abuse of rights.
- The degree to which patents should be protected is a subject of much controversy in view of the danger of the exclusive right of the patentee being used for sterilising inventions rather than for economic and social progress. A conservative legal order would stress most strongly the freedom of individual rights of established institutions. A totalitarian system would suppress or severely restrict the interests of personality in favour of the interests of the State. The very conception of neutrality in the catalogue of interests, the evaluation of which depends upon changing political and social systems, is the trait of a liberal approach.
- Pound's metaphor of "Engineering" has been criticised on the ground that it suggests a system of merely mechanical expedients, mechanically administered to social exigencies. However, a metaphor should not be pressed too far. That hardly seems to be the meaning of Pound. After all, engineering is a matter of nice calculation and ingenious resource as well as of cogs and wheels and levers.

10 It is also contended that if we stress upon the experimental aspect of law, we shall be in danger of falsifying the manner in which it does in fact operate within a large part of its territory. Experiment implies initiative and a ceaselessly "engineering" law suggests the picture of a science which is always seeking new instruments, new expedients, for new needs new goods, in short good life. The picture is accurate enough for a great deal of what is called social legislation in the modern state. It is true that in the world of today no enlightened system of law is content with being merely static. It must also be dynamic and a great deal of thought and knowledge is necessary to make it usefully dynamic. Much of the modern law is dynamic. Much is and must be static in the sense that it aims at regulation of behaviour and maintenance of order. Pound himself has admitted that whole theories of law in the past have been content with the dominating purpose of keeping peace and students of English common law are aware how much of it has grown up round the cardinal notion of King's peace. Hence, if we are to regard law as an engine, let us think of it as a dynamo. Sometimes the dynamo drives a crane, a drill, a riveter or even a mechanical shovel, but frequently it also actuates a gyroscope to maintain stability.

Sir C. K. Allen points out that if we are to think of "wants and desires" as the essential subject matter of law, we should give that term the widest interpretation, so wide that it becomes difficult to draw a line of demarcation between the scope of sociological jurisprudence and that of any other kind of jurisprudence. The sociological point of view suffers from the same besetting sin as the utilitarian. It is apt to thrust on society what society ought to want and desire, just as Bentham offered, as actual goodness and happiness, what ought to make men good and happy and what would make men good and happy, if they were not sometimes strangely obstinate about their likes and dislikes.

The danger in Pound's theory lies in interpreting wants in their subjective immediacy. This is not what Pound intended. However, as his thesis remains undeveloped, it is open to this interpretation. If the satisfaction of wants is the end of law, then the politician can hardly be blamed if he estimates demands in terms of letters and telegrams, nor the judge if he keeps his ear

to the ground to catch the public clamour. Those who demand nothing will get nothing. Those who want little will get little. Those who make extravagant claims will get less than they demand but more than they deserve. A need of which people are not conscious can hardly be counted and one which is unexpressed will not be likely to be given consideration. According to Prof. Fite, there is no obligation to respect the personal interests of those who evade the responsibility of standing for themselves. This attitude results in the pressure-group theory of government which sees the legislature as a scene of struggle between competing interests and the cabinet as made up of the representatives of various classes. Another evil which attaches to this view is that if justice consists in satisfying as much as possible of the whole body of existing wants with as little sacrifice as possible, then there is no injustice in taking care that embarrassing wants do not arise. Beyond the bare necessities of life, wants are not a native endowment. They emerge with widening experience as the taste for luxuries or music, or they can be created artificially.

The theory is no better if wants are interpreted to include potential or possible wants. Then the aim would be to create as many wants as possible in order to satisfy them. It is not clear that a life full of many wants all of which can be satisfied, is better than a well-ordered life with simple and noble ends. Wants in themselves are impulses to action and not ends of action. They become ends when that which will satisfy them is subject to rational consideration. Ends become public ends, an integral part of public policy and constructive legislation when the organisation is set which will achieve its realisation.

The judge is not compromising conflicting interests and trying to conserve as many wants as possible. He is not merely an umpire presiding over a fight between the plaintiff and defendant and trying to reach a decision that will satisfy as much as possible of the demands of each. He is judging the right. Even in cases of private litigation, he is the representative of the State and gives primary consideration to the social bearings of his decision. He is guided by the ideals which control public policy.

Pound's theory shifts the centre of gravity in the legal order from legislation to court judgments, but the judiciary has its

limitations. It does not have the machinery of enforcing its decisions and therefore cannot really do effective social engineering. For example, despite the famous judgment of the Supreme Court of America in *Brown v. Board of Education* (1954), discrimination against Negroes continues in practice in the United States. Moreover, in a scientific society the law must conform to a scientific plan which can be prepared only by legislators. Judges can give *ad hoc* judgments on specific issues coming up before them but they cannot frame a broad plan for restructuring society. Of course, a judge can focus attention on a pressing social problem and through his judgment can create a modern legal principle or suggest some alteration in the law, but he cannot do what the legislature can do.

The concept of harmonising conflicting social interests raises several problems. It presumes that all conflicting social interests can be reconciled which may not always be true. For example, it is debatable whether the interests of labour and capital can be reconciled. There may be certain backward or reactionary interests which should be suppressed and not reconciled if society is to progress. Why should such interests be harmonised with interests that are progressive in nature? Pound's theory is in fact "neutralist" or rather *status quoist* in this respect.

Justice without law can result in total lawlessness and arbitrariness. The rule of law, that is, the view that decisions should be made by the application of known rules and principles, was a great achievement of positivist jurisprudence. To abandon it would be a retrograde step.

Prof. Dias points out that Pound's engineering analogy is apt to mislead. What, for instance, is the "waste and friction" in relation to the conflict of interests? Further, the construction, for example of a bridge, is guided by a plan of the finished product and the stresses and strains to be allowed to each part are worked out with a view to producing the best bridge of that kind in that place. But with law there can be no plan, worked out in detail, of any finished product, for society is constantly developing and changing and the pressures behind interests are changing too. Therefore, the value or importance to be allotted to each interest cannot be predetermined. (*Jurisprudence*, p. 601).

Dias also points out that Pound assumed that *de facto* claims pre-exist laws which are required to "do something" about them. However, it can be contended that claims are consequent on law, e g., those that have resulted from welfare legislation. Moreover, what does "do something" about them mean? It is not enough to say that law has to select those that are to be recognised. "Recognition" has many gradations which makes it necessary to specify in what sense an interest is recognised. It is difficult to say in what sense the law recognises or does not recognise an interest (*Ibid* , pp. 601-2).

It is not interests as such but the yardsticks with reference to which they are measured that matter. It may happen that some interest is treated as an ideal in itself and in that case it is not the interest as an interest, but as an ideal that will determine the relative importance between that interest and other interests. Whether the proprietary right of a slave-owner is to be upheld or not depends upon whether sanctity of property or the sanctity of the person is considered as the ideal. The choice of an ideal or even a choice between competing ideals, is a matter of decision and not of balancing. Lawyers are concerned with the choice made by the judges and the ideals adopted by them (*Ibid.*, p. 602)

The balancing metaphor is also misleading. If two interests are to be balanced, that presupposes some "scale" or "yardstick" with reference to which they are measured. One does not weigh interests against one another, even "on the same plane". With reference to some ideal, it is possible to say that the upholding of one interest is more consonant with, or more likely to achieve it, than another. That means that with reference to that given ideal, one interest is entitled to preference over the other. Moreover, the "weight" to be attached to an interest will vary according to the ideal that is used. With reference to the ideal of freedom of the individual, all interests pertaining to individual self-assertion will carry more weight than social interests. With reference to the ideal of the welfare of society, the opposite may be true. The whole idea of balancing is subordinate to the ideal in view. The march of society is gauged by change, in its ideals and standards for measuring interests (*Ibid* , p. 602).



All questions of interests and ideals should be considered in the context of particular issues as and when they come up for decision. Each situation has a pattern of its own and the different types of interests and activities that might be involved are infinitely various. It is for the judge to translate the activity involved in the case before him in terms of an interest and to select the ideal with reference to which the competing interests are to be measured. The listing of interests is not as important as the views which particular judges take of given activities and the criteria by which they evaluate them. (*Ibid.*, p. 603).

Interests exist and are made articulate when they are presented in litigation. Lists of interests can be drawn up, not in advance of, but after the various interests have been contended for in successive cases. (*Ibid.*, p. 603).

The recognition of a new interest is a matter of policy. The mere presence of a list of interests is of limited assistance in helping to decide a given dispute. Interests need only be considered as and when they arise in disputes. What is important is the way in which they are viewed and evaluated by the particular judge. (*Ibid.*, p. 603).

It is difficult to see how the balancing of interests will produce a cohesive society where there are minorities whose interests are irreconcilable with those of the majority. How does one "balance" such interests? Whichever interest is favoured, the decision will be resented by those espousing the other. A compromise will most likely be resented by both. There is a different problem where a substantial proportion of the population is parochially minded and have little or no sense of nationhood. The theory of Pound cannot be accepted generally. (*Ibid.*, p. 604).

Dias points out that although Pound did not ignore ideals of guidance, he devoted too little attention to them. His awareness of them is evident in his distinction between "natural natural law" and "positive natural law". According to him, the former is "a rationally conceived picture of justice and an ideal relation among men, of the legal order as a rationally conceived means of promoting and maintaining that relation, and of legal precepts as rationally conceived ideal instruments of making the legal order

effective for its ideal end". The latter is "a system of logically derived universal legal precepts shaped to the experience of the past, postulated as capable of formulation to the exigencies of universal problems and so taken to give legal precepts of universal validity." The view of Dias is that it would have been preferable if Pound had enlarged on the criteria of evaluating interests instead of developing particular interests. His work has not much practical impact on account of his sterile preoccupation with interests and too little attention to the criteria of evaluation. (*Ibid.*, pp-604-5).

Pound on Social Justice.—Pound also advanced and elaborated a theory of social justice. Although his theory of justice was avowedly inspired by German sociological jurisprudence, it expressed tendencies clearly recognizable in English and American judicial and legislative practice. As his theory is in fact the development of Bentham's theory of utility as applied in the sphere of law, many English lawyers who have received the tradition of utilitarian doctrine are disposed in its favour.

Pound wrote thus in 1912: "In general, sociological jurists stand for what has been called the equitable application of law, that is, they conceive of the legal rule as a general guide to the judge, leading him towards the just results but insist that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the general reason of ordinary men."

✓ In *Justice According to Law*, Pound said: "We come to an idea of a maximum satisfaction of human wants or expectations. What we have to do in social control and so in law, is to reconcile and adjust these desires—wants or expectations, so far as we can, so as to secure as much of the totality of them as we can."

In dealing with a specific social problem, Pound stressed that the just solution could only be achieved if the interests involved were assembled within one of these classes. He was inclined to resolve most social problems by weighing or adjusting the relevant social interest. Many will conflict so that all cannot be satisfied in full. Before a just order of that society can be achieved, some selection of the interests which are to be satisfied must be made.

While not denying that dispensing justice according to fixed rules has the advantages of certainty and uniformity, Pound suggested that in order to harmonise conflicting interests in modern dynamic society, the judge will often have to dispense "justice without law", that is, without following any prescribed rule or precedent. That was due to the fact that in view of the fast changes in industrial society, new situations and problems were cropping up which had no precedent and for which law has laid down no rule.

Pound argued that while on the one hand society was fast changing in the era of science and technology, men seek stability due to their desire for security. Therefore, the problem was put in these words by Pound: "Law must be stable and yet it cannot stand still."

Pound's solution to the problem was his concept of "justice without law", that is, decisions given not on the basis of any fixed legal norm but in a purely *ad hoc*, empirical manner. This notion leads to the lawlessness of the realist school which had an important impact on American jurisprudence.

*Pound's Contribution* — Pound's contribution to jurisprudence is considerable. He, more than anyone, helped to bring home the vital connection between laws, their administration and the life of society. His work set the seal on prior demonstrations of the responsible and creative task of lawyers, specially the judges. In so far as his theory laid such heavy emphasis on the existence of varied and competing interests and the need for adjustment between them, it will have enduring value. (Dias: *Jurisprudence*, p. 601).

The legal philosophy of Pound was free from all dogmas. He took a middle way avoiding all exaggeration. He spoke of values but called them relative. He put emphasis on "engineering" but did not forget the task of maintaining a balance. His approach was experimental. His theory stood on a practical and firm ground and inspired great practical field work. He put emphasis on studying the actual working of legal rules in society. He stressed the importance of social research for good law-making. He pointed out the great constructive function performed by law. He

pointed out the responsibility of the lawyer, the judge and the jurist and gave a comprehensive picture of the scope and field of the subject. His influence on modern legal thought was great.

The view of Lord Lloyd is that Pound leaned heavily on Ihering, Ross, Ward and Small and contrived to impart to the American approach a distinctive flavour which brought it into harmony with contemporary trends in the United States. (*Introduction to Jurisprudence*, p. 356).

Pound can rightly be called the father of sociological jurisprudence in the United States. It is true that there were sociological jurists before him like Ross, Ward and Small, but no one before him had created such an elaborate theory which had such a large impact on legal thought.

D. Wigoder writes: "Pound was the perfect type to direct the transmission of new learning to an intellectually rigid profession.... His legal theory was marred by its contradictions and ambivalence, but there was nothing ambivalent about his influence. In the last analysis, his most important legacy was in the questions he posed rather than the answers he provided." [Roscoe Pound: *Philosophy of Law*, (1974), p. 287].

### *Karl Renner*

Renner is a socialist. He attacks the capitalist system of law on the ground that under that system the formal legal concepts do not coincide with the actual contents of the concepts in practice. In the beginning, the concept of ownership was a relation between an individual and a thing. However, due to economic evolution, it now implies a complex aggregate of things known as capital. Through capital, the capitalist exercises power over others. The result is that ownership now indicates a relationship between man and man which was not so in the beginning. Under the name of ownership, the capitalist has assumed a power of command over men which is a public power. Renner maintains that ownership in modern times must be recognised as a branch of public law and the State must intervene to protect the citizen. He stands for creating legal norms which may completely express the trend of social development. His view that legal concept must be accompanied by and based on economic reality may be described as

“functional jurisprudence” under Marxian colour. He pleads forcefully the need for revaluation of legal concepts so that they coincide with the economic conditions of society. He also says that legal norm has its own creative force.

### *Pashukanis*

Pashukanis is a Marxist from the Soviet Union. His main thesis is that law, like the State, is an instrument of oppression in a capitalist society. When means of production pass into the hands of the community, it withers away.

Many other Soviet jurists have given their theories regarding the development and end of law but very little of it has any place in textbooks on jurisprudence because much of it has only propaganda value.

### *Parsons*

Parsons sees the major function of the legal system as integrative. To quote him: “It serves to mitigate potential elements of conflict and to oil the machinery of social intercourse. It is, indeed, only by adherence to a system of rules that systems of social interaction can function without breaking down into overt or chronic covert conflict.” Parsons insists on the analytical separation of the “legal system” and the “political system”, though he admits that they are closely related. The analytical separation is made easier by Parsons’ assertion that the interpretative work of the courts is the central feature of the legal order. The legislature which is the centre of the political system, formulates policy.

### *Stone*

Prof. Stone is a representative of modern sociological jurisprudence in arguing for theory to enable us to use the social and economic order in its complex unity. According to him, one of the main faults of classical sociological jurisprudence was its *ad hoc* approach, the treatment of particular problems in isolation. “The sociological jurist of the future will generally have to approach his problems through a vast effort at understanding the wider social context.” The view of Stone is that in spite of its defects and faults, the Parsonian “social system” is the type of model to which sociological jurists must aspire. A common

malaise in sociological jurisprudence is its prevalent methodology of working outwards from legal problems to the relevant social science. What is needed is "a framework of thought receptive of social data which will allow us to see the 'social system' as an integrated equilibration of the multitude of operative systems of value and institutions embraced within it."

## Conclusion

About the sociological school of law, Prof. Dias writes that the greatest practical contribution of various sociological approaches has been fieldwork in examining the interaction between law and its social *milieu*. Another outcome is likely to be a pointer to the evolution of ideals on an empirical basis. It has been abundantly demonstrated that laws play a significant and creative role in society and such a dynamic function presupposes the existence of ideals which provide directing force. The transcendental idealism of the past suffered a blow at the hands of positivism from which it could never hope to recover. Positivism in turn faltered in the face of the problems that confronted it. The rise of sociological study has made possible a synthesis between the two by restoring ideals in a way that could satisfy and give life to the exacting positivist discipline. It is no coincidence that the functional approach has heralded a revival of natural law in the 20th century. It was a necessary precursor. (*Jurisprudence*, p. 616).

Howsoever divergent the views of various sociological jurists may appear, they have one common point that law must be studied in relation to society. This view has a great impact on modern legal thought.

Paton writes that the greatest achievement of the functional school is that it has infused new life into both the body and development of law. A promising beginning has been made from which much can be expected in the future. The actual functioning of certain parts of law has been intensively studied. Perhaps the most valuable results are a new understanding of the judicial method and a broader outlook both in the universities and in the courts. A determined attempt is now being made to teach law as a function of society instead of a mere abstract set of rules, while the courts are canvassing freely the reasons of social policy which

lie behind certain rules of law. Allen says that "the whole theory of the sociological school is a protest against the orthodox conceptions of law as an emanation from a single authority in the State or as a complete body of explicit and comprehensive propositions applicable by accurate interpretation to all claims, relationships and conflicts of interests "

Critics of the sociological school of law point out that its advocates desire to teach a little of everything except law. A textbook on sociology cannot become a work on jurisprudence by merely changing the title. A knowledge of the properties of clay may be useful to a modeller but 20 years spent in scientific analysis of that material would be a waste of the talent of the artist. Manning compares a sociological jurist to a Professor of Mathematics who is concerned about the bridges of the country and who urges his students to form the advance guard of creative engineering and who stresses that mathematics cannot be studied in isolation from town planning.

Another writer observes: "Anatomy is all you need to know. It is true that you will gain your knowledge from a dissection of the dead and in your practice you will be concerned with the bodies of those who, at least until they receive your merciful attentions, are still in the land of the living. It is true also that in the case of the patient psychological forces, business worries and married life may affect his health. But the study of these things is difficult and if we want an impartial science we must leave them alone. Austin, our founder, recognised that some of these things would affect your professional practice, but he wisely concentrated on anatomy alone. I advise you to do the same and to save your profession from having a little knowledge of everything save anatomy."

The relationship between law and social interests can be studied by jurisprudence for three reasons. The first reason is that it enables us to understand the evolution of law in a better manner. What is required is not a dogmatic assumption that economic self-interest or some such force has determined the volition of law but an analysis of the interaction between a tradition which has sanctified the structure of law and the immediate pressure of social demands. The second reason is that although the views of man on

ethics and his social needs have changed, yet the element of human interest provides a greater substratum of identity than the logical structure of the law. Comparative law shows that while the legal theories of two systems may be very much different, each may be forced for reasons of convenience to modify itself in application so that ultimately the practical results are not far removed. The third reason is that a study of the social interest is essential to the lawyer to enable him to understand the legal system.

### SUGGESTED READINGS

- |                                       |  |
|---------------------------------------|--|
| Allen, C.K.                           | : <i>Law in the Making</i> , 6th ed., Oxford, 1958.  |
| Allen, C.K.                           | : <i>Legal Duties</i> , Oxford, 1931.  |
| Bendix, R.                            | : <i>Max Weber: An Intellectual Portrait</i>   |
| Buckland, W.W                         | : <i>Some Reflections on Jurisprudence</i> , Cambridge University Press, 1945  |
| Cairns, H.                            | : <i>The Theory of Legal Science</i> , University of North Carolina Press, 1941.                                     |
| Cardozo, B.N.                         | : <i>The Growth of the Law</i> , Yale University Press, 1924.  |
| Cardozo, B.N.                         | : <i>The Nature of the Judicial Process</i> , Yale University Press, 1921.   |
| Carlston, K.S.                        | : <i>Law and Structure of Social Action</i> , Stevens & Sons Ltd., 1956.   |
| Castberg, F.                          | : <i>Problems of Legal Philosophy</i> , 2nd ed., Oslo University Press, Allen & Unwin Ltd., 1957.                    |
| Cohen, F S.                           | : <i>Ethical Systems and Legal Ideals</i> , Falcon Press, 1933   |
| Cohen, J., Robson, R.A. and Bates, A. | : <i>Paternal Authority: The Community and the Law</i> , Rutgers U.P., 1958.   |
| Cowan, T.A.                           | : <i>The American Jurisprudence Reader</i> , Oceana Publications, 1956.  |
| Dias, R.W.M.                          | : <i>Jurisprudence</i> , London, 1976.   |
| Duguít, L.                            | : <i>Law in the Modern State</i> , trans. F. and H. J. Laski, Allen & Unwin Ltd., 1921.                              |
| Duguit, L.                            | : <i>Modern French Legal Philosophy</i> , trans. F.W. Scott and J.P. Chamberlain, The Macmillan Co., New York, 1921. |
| Ehrlich, E.                           | : <i>Fundamental Principles of the Sociology of Law</i> , trans W.L. Moll, Harvard University Press, 1936.           |
| Friedmann, W.                         | : <i>Law in a Changing Society</i> , Stevens & Sons Ltd., 1959   |
| Friedmann, W.                         | : <i>Legal Theory</i> , 5th ed., Stevens & Sons Ltd., 1967   |
| Ginsberg, M                           | : <i>Reason and Unreason in Society</i> , Longman, Green and Co., 1947.  |
| Gurvitch, G                           | : <i>Sociology of Law</i> , Routledge & Kegan Paul Ltd., 1947.   |



- Hall, J. : *Comparative Law and Social Theory*, Louisiana State U.P., 1963.
- Hall, J. : *Foundations of Jurisprudence*, The Bobbs-Merrill Co. Inc., 1973.
- Hall, J. : *Living Law of Democratic Society*, The Bobbs-Merrill Co. Inc., 1949.
- Hall, J. : *Readings in Jurisprudence*, The Bobbs-Merrill Co., 1938.
- Hunt : *The Sociological Movement in Law*, 1978.
- Ihering, R. von : *Law as a Means to an End*.
- Ilbert, C. : *Great Jurists of the World*, ed. J. MacDonell and E. Manson, John Murray, 1913.
- Johnson, H M. : *Sociology: A Systematic Introduction*, Routledge & Kegan Paul Ltd., 1961.
- Jolowicz, H.F. : *Lectures on Jurisprudence*, ed. J.A. Jolowicz, The Athlone Press, 1963.
- Jørgensen, S. : *Law and Society*, Akademisk Boghandel, 1972.
- Kocourek, A. : *An Introduction to the Science of Law*, Little, Brown & Co., 1930.
- Lasswell, H.D. : *Power and Personality*, Norton and Co., New York, 1948.
- Lloyd, D. : *Introduction to Jurisprudence*, 4th ed., Stevens & Sons Ltd., 1979.
- Lloyd, D. : *The Idea of Law*, Penguin Books Ltd., 1964.
- Morris, C. : *The Great Legal Philosophers*, University of Pennsylvania Press, 1959.
- Paton, G.W. : *A Text-Book of Jurisprudence*, 4th ed., G.W. Paton and D.P. Derham, Clarendon Press, Oxford, 1972.
- Patterson, E.W. : *Jurisprudence*, The Foundation Press Inc., 1953.
- Pound, R. : *An Introduction to the Philosophy of Law*, Yale University Press, 1922.
- Pound, R. : *Contemporary Juristic Theory*, War Ritchie Press, 1940.
- Pound, R. : *Interpretations of Legal History*, Cambridge University Press, 1923.
- Pound, R. : *Jurisprudence*, West Publishing Co., 1959.
- Pound, R. : *My Philosophy of Law*, Boston Law Book Co., 1941.
- Pound, R. : *Social Control Through Law*, Yale University Press, 1942.
- Pound, R. : *The Spirit of the Common Law*, Marshall Jones Co., Boston, 1921.
- Reuschlein, H.G. : *Jurisprudence: Its American Prophets*, The Bobbs-Merrill Co. Inc., 1951.
- Sawer, G. : *Law in Society*, Oxford, 1965.
- Seagle, W. : *The Quest for Law*, Alfred A. Knopf, 1941.
- Selznick : *The Sociology of Law*.

- Simpson (Ed.) : *Oxford Essays in Jurisprudence*, (Second Series).
- Simpson, S P. and Stone, J. : *Cases and Readings on Law and Society*, West Publishing Co., 1949.
- Sorokin, P. : *Contemporary Sociological Theories*, Harper and Bros., 1928.
- Stone, J. : *Human Law and Human Justice*, Stevens & Sons Ltd., 1965.
- Stone, J. : *Social Dimensions of Law and Justice*, Stevens & Sons Ltd., 1966.
- Timasheff, N.S. : *An Introduction to the Sociology of Law*, Harvard University Committee on Research in the Social Sciences, 1939.
- Wigdor, D. : *Roscoe Pound, Philosopher of Law*, Greenwood Press, Connecticut, 1974.

## XXVII

### AMERICAN REALISM

The realist movement is a part of the sociological approach and it is sometimes called the "left wing of the functional school". It differs from the sociological school as it is little concerned with the ends of law. It concentrates on a scientific observation of law in its making and working. The movement is called "realist" as it studies law in its actual working and rejects the traditional definition of law that it is a body of rules and principles which are enforced by the courts. The advocates of the realist movement concentrate on the decisions given by law courts. They not only study the judgments given by the judges but also the human factor in the judges and lawyers. They study the forces which influence judges in reaching their decisions.

The American realist movement is a combination of the analytical positivist and sociological approaches. It is positivist in the sense that it regards law as it is and not as it ought to be. The ultimate aim is to reform the law, but that cannot be done without understanding it. Law is the product of many factors and therefore the realists are interested in those sociological factors which influence law. They share with the sociologists an interest in the effects of social conditions of law as well as the effect of law on society. They put too much emphasis on judges. To them law is what judges decide. That is partly due to the fact that judges have played a very important part in the growth of the American Constitution and law. The approach of the realists is essentially empirical. Their view is that the decisions of the judges are brought about by ascertainable facts. Some of them are the personalities of the individual judges, their social environments, the economic conditions in which they have been brought up, business interests, trends and movements of thought, emotions, psychology etc. The importance of the personal element is not new, but the contribution of the realists lies in the

fact that they have put too much emphasis on it. Emphasis on this point has been put by Gray in these words: "Suppose, Chief Justice Marshall had been as ardent a Democrat (or Republican, as it was then called) as he was a Federalist. Suppose, instead of hating Thomas Jefferson and loving the United States Bank, he had hated the United States Bank and loved Thomas Jefferson, how different would be the law under which we are living today."

While calling American realism a revolt against formalism, Lord Lloyd points out that in the nineteenth century and at the beginning of the twentieth century, *laissez faire* was the dominant creed in America. That creed was associated with a certain attachment to what has been called "formalism" in philosophy and the social sciences. That was marked by a reverence for the role of logic and mathematics and *a priori* reasoning as applied to philosophy, economics and jurisprudence, with but little urge to link them empirically to the facts of life. However, empirical science and technology were increasingly dominating American society and with that development arose an intellectual movement in favour of treating philosophy and the social sciences as empirical studies not rooted in abstract formalism. That movement in America was associated with the name of Justice Holmes in jurisprudence. (*Introduction to Jurisprudence*, p. 451).

Dr. Friedmann also points out that no country could offer richer material for the study of law as it worked in fact than the United States, with a Federal and forty-eight State jurisdictions, together producing innumerable precedents, with the function which the Supreme Court exercised in the political and social life of the country; with the contrast between the theoretical and practical aspect of constitutional principles; with the development of powerful corporations protected by the same individual rights as the pioneer farmer in the Wild West; with the manifold political machinations within the judicial system. These and many other factors contributed to develop a scepticism symptomatic of the crisis which affected the nineteenth century's outlook on life in the law no less than in other fields. (*Legal Theory*, p. 245).

The organisation of the judicial system in the United States also played its part. The Supreme Court is the final authority

not only to interpret law but also to decide its validity. The judges of the lower courts in the United States are elected and they are influenced by extraneous considerations while deciding cases. The existence of separate State jurisdictions caused a multiplicity of laws and decisions. All these made some jurists concentrate more on courts to know the actual working of law and to study those factors which determine and influence it.

### *Gray (1839-1915)*

Dr. Friedmann considers John Chipman Gray (1839-1915) and Oliver Wendell Holmes (1841-1935) as the mental fathers of the realist movement (*Ibid.*, p. 246). Gray, although a distinguished exponent of the analytical tendency in jurisprudence, relegated statutory legislation from the centre of the law to one of several sources and placed the judge in the centre instead. His own definition as well as his comments admit and emphasise the great influence of personality, prejudice and other non-logical factors upon the making of law. The illustrations given by him show how political sympathy, economic theory and other personal qualities of particular judges have settled matters of the gravest importance for millions of people and hundreds of years. Gray prepared the ground for a more sceptical approach.

### *Justice Holmes (1841-1935)*

That tendency was made articulate by Justice Holmes who, in an essay published in 1897, gave an entirely empirical and sceptical definition of law in these words: "Take the fundamental question, what constitutes the law . . . you will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted actions, or what not, which may or may not coincide with the decision. But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English courts are likely to do in fact. I am much of his mind. *The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law*".

Prof. Dias points out that Justice Holmes was not giving a final definition of law. The statement that law is only what

courts do is iconoclastic and suggests that ethics, ideals and even rules should be put on one side. Holmes himself had no such intention as he himself insisted in the same paper on the need to restrict the area of uncertainty and the need for more theory. To quote him: "We have too little theory in the law, rather than too much" When he wrote, he did not have any suspicion that he would be hailed as the prophet of a new faith. (*Jurisprudence*, pp 621-22). Dr Friedmann points out that the abovementioned statement was taken as a gospel by the followers of realism and jurisprudence and they followed that and some similar statements of Holmes with almost religious fervour. (*Legal Theory*, p. 247).

Both in his writings and his long tenure as a judge of the Supreme Court of America, Holmes played a fundamental part in bringing about a changed attitude to law. He put emphasis on the fact that the life of law was experience as well as logic. He stressed the empirical and pragmatic aspect of law. For him, legal history was to be studied primarily as a first step towards a deliberate reconsideration of the worth of rules developed historically. According to him, law must be strictly distinguished from morals. A lawyer is concerned with what the law is and not with what it ought to be. Holmes was never tired of asserting how "policy" governed legal development, especially in the form of the "inarticulate" convictions of those engaged in creating law. Holmes felt that the development of law could be justified scientifically. In this respect, Holmes relied more on practical than on pure science, the lawyer trained in economics and statistics though he nowhere clearly indicated how an objectively sound "policy" was to be attained. Holmes accepted the possibility of scientific valuation in law, but he did not go so far as Dewey in the view that the choice between different values can also be verified scientifically. For Holmes, the arbiter of this choice could only be naked force.

Holmes' view of law as "prediction" placed both litigation and the professional lawyers in the centre of the legal stage. His emphasis on what courts may do, rather than on abstract logical deduction from general rules, focussed attention of the empirical factors which constitute a legal system. There was much in the American system which made this new approach acceptable to

American lawyers. Holmes' reliance on practical social science seemed to point the way to future progress. His dissenting judgments in *Lochner* and *Adams* cases were thought to point the way to a more rational and scientific application of the Constitution to the actual social needs of the highly industrialised modern society

The view of Lord Lloyd is that despite Holmes' great influence both as part of the general movement and as the outstanding American jurist of his day, it was not until towards the end of his career that a positive legal movement under the designation of "legal realism" began to manifest itself. (*Introduction to Jurisprudence*, p 455).

Prof Dias points out that there was no such thing as a "school" of American realists. The difficulty in presenting in a coherent manner their views arises from the fact that there are varying versions of realism as well as changes of front. Positions previously defended with zest have been given up. Justice Jerome Frank preferred the phrases "experimentalists" or "constructive skeptics". He described his own attitude as one of "constructive skepticism". He repudiated the charge that the realist school embraced fantastically inconsistent ideas by pointing out that "actually no such school existed". To quote him, the common bond is "skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interests of justice, some courthouse ways"

*Jerome Frank (1889-1957)*

Frank preferred to call himself a "constructive legal sceptic" rather than a realist. He insisted that there were really two groups of realists: "rule-sceptics" and "fact-sceptics". The rule sceptics rejected legal rules as providing uniformity in law and tried instead to find uniformity in rules evolved out of psychology, anthropology, sociology, economics, politics etc. The fact-sceptics of whom Frank is one, depart not only from the idea of rule certainty but also point to the uncertainty of establishing facts in the trial courts. According to Frank, a legal decision is the result of the application of a rule of law to the facts as found by the judge. If the facts are wrongly found, the decision must be erroneous and an appellate court on which jurisprudence has tended to concentrate, not having seen the witnesses, is loath to

interfere with the findings of fact. Moreover, the difficulty of determining whether the guess of the judge as to the facts does correspond to the actual facts is sufficiently difficult where the testimony appears in the form of a printed record. The difficulty is still greater where the testimony, which the judge has heard, was oral as well as conflicting. The courts have often noted that the printed page omits the witness's tone of voice, the hesitation or readiness with which he gives his answer and similar phenomena. The result is that there is no yardstick for measuring the accuracy of the judge's finding of facts in a contested case. The judge often states the facts so loosely that it is not possible with any degree of accuracy to determine which part of the statement was the F (fact) he used in multiplying  $R \times F$  (rules into facts). The same is often true of the court's statement of the R (rule). It sometimes makes it difficult to use opinions as analogies for future cases. Commentators disagree as to both the R factors and the F factor present in many opinions. Thus the facts of the cases cannot be ignored as they alone could cause uncertainty in decisions. If and in so far as, Frank is stressing only the uncertainties introduced into the judicial process by the difficulty of finding the true facts, few would disagree with him. It is the lower courts which deal with an overwhelming percentage of the cases and to a submissive plaintiff, it may not matter whether he loses because of misunderstanding of the law or an error regarding facts. If the realist plea is that the court should improve the technique of factfinding, they emphasise a point which was not adequately stressed in the past

In actual practice, all legal arguments have a litigious setting. There is always the opponent prepared to come forward with an argument founded upon divergent authorities. This divergence and opposition of authorities which makes it probable for lawyers to argue and for judges to rationalise either of the two contradictory decisions is, in the opinion of Frank, one of the main sources of uncertainty in the settlement of an issue at law and evidence of the futility of viewing judicial decisions as products of deductive logic. The divergence of authorities is one of the conditions of the probability of any prediction of future judicial decisions. On account of the litigious and hence dialectical setting of legal argument, its authoritarian form is thoroughly justified. The



authorities chosen by one side of a legal dispute are its postulates. They are chosen as a result of a desired conclusion by processes of logically valid reasoning. The opposite side chooses its postulate in the same way and for the same end. The choice of postulates as authoritative for an argument is not a matter of logic. It is a matter of sagacity and knowledge. The only logical question is whether the conclusion desired to be drawn can be exhibited as tenable in terms of the authorities chosen deliberately for that purpose.

In his book *Law and the Modern Mind* (1930), Frank emphasized the fact that law is not certain. "Certainty of law is a legal myth." It is the "father-complex" which makes a man think in terms of the certainty of law. It is not proper for judges and lawyers to stick to the myth of certainty in the name of precedents and codifications. It is their duty to do some constructive work in every case and not merely follow precedents. It is very essential that the facts of every case must be examined in the background of the changed social conditions and only that decision must be given which is warranted by the changed circumstances. It is not proper to follow precedents blindly. According to Frank, the craving for certainty and guidance which men seek in law may stem, in part at any rate, from the yearning for security and safety which is an inescapable legacy of childhood. The child puts his trust in the power and wisdom of his father to provide an atmosphere of security. In the adult, the counterpart of this feeling is the trust reposed in the stability and immutability of human institutions. Frank suggested that the quest for certainty in law is in fact a search for a "father-symbol" to provide an aura of security. Although he attributed great prominence to this factor, he offered it only as a "partial explanation" of what he called the "basic myth" and listed fourteen other explanations as well. He called on the lawyers to outgrow their childish longings for a "father-controlled world" and follow the example of Justice Holmes, the "completely adult jurist".

Rules are merely word formulae. If they are to have any meaning at all, that meaning has to be sought in the facts of real life to which they correspond. Frank adopted the following quotation from Holmes: "We must think things not words, or at

least we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true."

Frank shows no acquaintance at all with formal logic. He has failed to realise that the subject matter of formal logic does not embrace the psychological phenomena of human thinking. He appears to have misrepresented formal logic as if it pretended to be a psychological account of human thinking. Frank's failure to follow the character of formal logic has serious consequences for his interpretation of the judicial process.

Logic of probability which Frank mentions very often as antithetical to the logic of certainty, is only a special branch of formal, deductive logic. Frank, Cardozo and Wurzel make only empty references to the logic of probability as the logic of law. They are partially correct but they show no understanding of the nature of the logic of probability. Certainty and probability are truth-values of proposition. Probability is merely the class of all truth-values ranging between but not including ignorance and certainty. If any proposition is probable, its contradictory proposition must also be probable. If the proposition predicting a judicial decision is only probable, contradictory propositions making other predictions must also be probable. The logic of probability is the formal analysis of the deduction of opposing predictions from opposing hypotheses in terms of available knowledge.

The fact that propositions predicting judicial decisions are only probable is linked with the fact that the demonstration of the proposition of law which every judicial decision must express explicitly or implicitly in terms of authorities or principles is absolutely certain. Unless the proof can be shown to be logically formally invalid, a judicial argument that demonstrates a given proposition as a tenable rule of law, renders that rule of law certain. However, the prediction of decisions should not be confused with the demonstration of rules. The argument predicting a judicial decision is deductive in form and involves both legal and extra-legal factors. It involves a knowledge of law, of principles of policy, of social trends, of the personality of the judge etc. The prediction of the future decision and the formal analysis of legal arguments are closely related.

Frank failed to distinguish law in action and discourse and to appreciate the logical pluralism which is at the same time a source both of certainty and fertility. Law in the first sense is a term which designates all the actual processes which take place in time, the prosecution of litigation, the advisory work of the law office, the judicial administration of disputes and so on. Law in the second sense is an academic subject matter, a body of propositions having certain formal relations capable of analysis. Mortimer J. Adler writes that there is no reason why there should not be a science of law in both these sense of the term, but the two sciences are quite different things and all the trouble comes from confusing them. The science of law as official action is an empirical observation and includes a study of sociological and psychological phenomena as well as knowledge of law. The science of law in discourse is a purely formal science like mathematics. Its subject matter is completely propositional. Its only instrumentality is formal logic. It deals with certainties and nothing else.

*Carl N. Llewellyn (1893-1962)*

*Institutions and Law-jobs.*—According to Llewellyn, law is an institution. An institution is an organised activity which is built around doing a job or a “cluster” of jobs. In the case of a major institution, its “job-cluster” is fundamental to the continuance of the society or group in which it operates. The institution of law in our society is an extremely complex one. It consists not only of a body of rules organised around concepts and permeated by a large number of principles, but also the use of precedents and ideology. In addition to these, there are many practices some of which are flexible and some rigid, which determine how certain things within the legal system may or may not be done. All such matters control in various ways the activities of the “men-of-law”. Much of the interest of Llewellyn is centered upon what he calls the ways in which in various types of communities the “law-jobs” are actually carried out.

Llewellyn describes “law-jobs” as the basic functions of law which are twofold: “to make group survival possible”, but additionally to “quest” for justice, efficiency and a richer life. To this end, he lists “law-jobs” as the disposition of “trouble cases”; “preventive rechannelling”, the reorientation of conduct

and expectations to avoid trouble; the provision of private law activity by individuals and groups such as the autonomy inherent in a law of contract; and "the say", the constitutional provision of procedures to resolve conflict. The first three jobs describe "bare bones" law, but out of them may emerge the additional "questing" phase of the legal order. For Llewellyn, the problem was to find the best way to handle "legal tools to law-job ends." This brings one to his notion of a "craft" as a minor institution. A craft in this sense consists of a kind of "knowhow" among a body of specialists who are engaged in performing certain of the jobs within the framework of an institution. It consists of an organised and continuous body of skills developed by specialists and handed on from generation to generation by a process of education and practical example. The practice of the law is the practice of a set of crafts and the most important is the juristic method.

*Common Law Tradition.*—In his book, *The Common Law Tradition*, Llewellyn develops his idea of a craft in great detail. The book is a kind of handbook of the craft both of judging and of advocacy within the framework of the common law tradition, though applied specially to appellate cases. The aim of the book is to deal with what it describes as a "crisis of confidence within the Bar", concerning particularly the question whether there is a reasonable degree of "reckonability" in the work of the appellate courts in the United States. Llewellyn points out that the legal profession in the United States is exceedingly worried because it is believed that the courts have moved away from a basis of stable decision-making, in favour of deciding cases on the basis of their sentiments and then seeking for *ex-post-facto* justification in their judgments.

According to Llewellyn, there is a large measure of predictability in case law which is due to the general craft of decision-making in the common law tradition. He examines what he calls a "cluster of factors" which tend to have a major steadying influence in producing stability in the work of the courts. These include such matters as "law-conditioned officials", known doctrinal techniques, the limiting of issues, the adversary arguments of counsel etc. In this book, Llewellyn emphasizes the importance of what he calls the general "period style" employed by the courts.

Llewellyn makes no attempt to test empirically the steadying factors. He gives no indication of how an assessment could be made of the relative weight of each and how each can be used for productive purposes.

Llewellyn's discussion of "period-style" is of great interest. In the common law, the practice of the courts has fluctuated between two types of style called the Grand Style and the Formal Style. The Grand Style is based essentially on an appeal to reason and does not involve a slavish following of precedent. Regard is paid to the reputation of the judge deciding the earlier case and principle is consulted in order to ensure that precedent is not a mere verbal tool, but a generalisation which yields patent sense as well as order. Policy comes in for explicit examination. Under the Formal Style, the underlying notion is that the rules of law decide the cases. Policy is for the legislature and not for the courts. Hence the approach is authoritarian, formal and logical. The Grand Style is also characterised by resort to "situation-sense". The Formal Style is not so concerned with social facts. The Grand Style is concerned with providing guidance for the future far more than is the Formal Style.

Llewellyn does not assert that the styles are ever found in their absolute purity at any given moment. There is a tendency for this movement from one period to another between the opposite poles. Llewellyn regarded the Grand Style as characteristic of the creative period of American law in the early part of the 19th century. After that, there was a rapid move towards the Formal Style. The view of Llewellyn is that in recent times the appellate courts in the United States have been moving steadily back towards the earlier type of Grand Style. It is this tendency which has misled the legal profession into thinking that there is a higher measure of unpredictability in their decisions than there was in the previous formal period. This was due to a misconception regarding the ways in which the court used precedent and the tremendous "leeways" which are afforded by the system of precedent.

Llewellyn confines his evidence almost exclusively to the material which appears from the actual decisions of appellate courts. He insists that we must learn to read those cases not for

what they decide but for their "dilemma". Do not look to "what was held", but look to "what was bothering and helping the court". Llewellyn virtually ignores subjective factors. He concentrates entirely on the actual decisions of the court as opposed to extrinsic factors. It is possible to show that there is an exceptionally high measure of "reasonability" in American appellate decisions.

What Llewellyn claims to have attempted and to some extent achieved is to establish a jurisprudence which may serve the needs of the ordinary student of law, the ordinary practitioner and the ordinary judge. In this process, many myths have to be eliminated.

The view of Llewellyn is that the common law system produces a remarkably high measure of predictability so that a skilled lawyer may be able to average correct predictions in 8 out of 10 cases.

*Principal Features of Realist Approach.*—Llewellyn outlines the principal features of the realist approach as follows:

- (i) There has to be a conception of law in flux and of the judicial creation of law.
- (ii) Law is a means to social ends and every part of it has constantly to be examined for its purpose and effects and judged in the light of both and their relation to each other.
- (iii) Society changes faster than law and so there is a constant need to examine how law meets contemporary social problems.
- (iv) There has to be a temporary divorce of "law" and "thought" for purposes of study. This does not mean that the ideas of justice and teleology are to be expelled altogether, but they are to be put on one side while investigating what the law is and how it works. By this divorce, both the processes will be improved. The realists are vitally interested in the aims and ends of the law as well as its desire to improve law that it has started. Adequate reform has to be by an examination of law.

operates in actual practice. Such an investigation will be defective if the ideas of justice are also mixed up during the investigation of facts.

- (v) The realists distrust the sufficiency of legal rules and concepts as descriptive of what courts do.
- (vi) The realists do not have trust in the traditional theory that the rules of law are the principal factors in deciding cases. They have drawn attention to many other influences which play a decisive role. It is absurd to define law solely in terms of legal rules.
- (vii) The realists believe in studying the law in narrower categories than has been the practice in the past. They feel that part of the distortion produced by viewing the law in terms of legal rules is that rules cover hosts of dissimilar situations where in practice utterly different considerations apply.
- (viii) The realists insist on the "evaluation of any part of the law in terms of its effects" and on "the worthwhileness of trying to find these effects."
- (ix) There must be a sustained and programmatic attack on the problems of the law along the lines indicated above.

Llewellyn admitted that these nine points were not new. The first three furnish an obvious foundation for any sociological approach to jurisprudence. The main characteristics of realism lay first in the peculiar prominence attached to the fourth, fifth, sixth, seventh and eighth points and secondly in the amalgamation of all nine points into a working programme and the actual carrying out of research along those lines.

The view of Lord Lloyd is that what Llewellyn claims to have attempted and to some extent achieved is to establish a jurisprudence which may serve the needs of the ordinary student of law, the ordinary practitioner and the ordinary judge. In this process, a good many myths have to be eliminated, and in particular both the myth that certainty can be achieved under a legal system or its opposite that predictability is unattainable. The view of Llewellyn is that the common law system produces a remarkably high measure of predictability so that a skilled lawyer proceeding

on the basis discussed in his latest book ought to average correct predictions in eight out of ten cases. (*Introduction to Jurisprudence*, p. 465).

The borderline between realist jurisprudence and sociological jurisprudence is not very clear. F. S. Cohen, a prominent realist, defines the realm of realist jurisprudence as the "definition of legal concepts, rules and institutions in terms of judicial decisions or other acts of State force" and the realm of sociological jurisprudence as "the appraisal of law in terms of conduct of human beings who are affected by the law". Cohen is aware of the fact that both the movements are in part complementary and in part overlapping, while both emerge out of common sceptical, scientific, anti-supernatural functional outlook. In spite of their commonness, both the movements differ in one respect that the former concentrates or limits itself to a scientific observation of law in its making and working, whereas the latter sets out to define the ends of law.

*Computer Prediction.*—It has been suggested that in so far as there is consistency in decision and attitude, the prediction of judicial opinions by computers becomes possible. Computer techniques in this connection have been of fact-studies and attitude-studies. With regard to the former, it is said that the acceptance of a fact by an appellate court rests on identifiable conditions surrounding the way in which it was presented to the trial court. If the accepted facts are combined in certain ways, the decisions will go one way. Personal attitudes are also said to be capable of being scaled by means of scalogram analysis. The basis of this is that a person who acts positively to a weak stimulus will react similarly to any stronger stimulus, while a person who reacts negatively to a strong stimulus will react similarly to any weaker stimulus. If a line of cases can be made to scale in this way, that would show that a set of values is shared by the members of that court. The future behaviour of that court then becomes predictable.

The view of Prof. Dias is that such attempts at prediction are destined to fail. The personal element cannot be eliminated from judicial decisions. Everything depends on how facts are viewed and stated. The same set of facts may be stated in different com-



binations and at different levels of generality. No mechanical aid can predict which combination or level is to be chosen. Different *rationes* can be extracted from a decision depending on whether the later court wishes to see resemblances or differences. If it is known which way a judge is going to regard a rule, a computer is not needed and if it is not known, a computer is useless. Moreover, the predictability of judicial decisions depends upon consistency in the attitude of the judges to values. The attitudes of the people change with age and experience. Computer prediction can only work on the basis of reported decisions and a majority of them, particularly those of lower courts, are never reported. The result is that the bulk of a judge's early decisions are not available and the basis for predicting his reactions is inadequate. Prediction requires constant working material. It cannot operate when new matter is introduced, whether in the form of legislation or creative decisions. Computers are of no help in such cases. Where the computer analysis has indicated that a judge's decision will be such and such in a particular case or a type of cases, that very fact could induce the judge either to decide accordingly or to decide the opposite deliberately so as not to be dictated by a machine. Both the reactions are not desirable. The data programmed into a computer will reflect personal quirks of the programmer which will be substituted for the quirks of the judge. That is wholly undesirable. Under the present system, the judge works in the open while the programmer works behind the scene.

### **Assessment of the Realist Movement in 1961**

In 1961, Prof. Yntema, himself a leading realist, attempted to assess the present and future of the realist movement. After stressing both the importance and influence of legal realism upon American law, lawyers and law schools, he conceded that a major defect of the realist movement had been the neglect of the more humanistic side of law, particularly revealed both in its neglect of the comparative and historical aspects of law and the tendency to place overemphasis upon current "legal practice". The result was a certain loss of perspective and in particular a failure to distinguish between what is trivial or ephemeral on the one hand and what is of wider import on the other. His suggestion for the

future is not to abandon the critical achievements of realism but to develop them on more constructive lines. That would involve a more humanistic conception of legal science, with due attention being paid both to the systematic analysis of legal theory and historical and comparative research. Whatever may be the future of legal realism as a movement, it cannot be denied that its impact has been such that things can never seem to be quite the same again. Moreover, the realist movement has indirectly engendered two movements viz., Jurimetrics and Behaviouralism. These movements have such an impact in the United States that they cannot be ignored. In one sense, they take over where realism left off. While the realists had some inspired ideas, developed a number of theoretical models and urged us to exploit the social and technological sciences, the two new movements are firmly established within the mainstream of the social sciences and use techniques associated with them freely and to valuable effect.

The realist movement in the United States has suffered from its own exaggerations. It can be accused of causing a great deal of controversy and confusion in a number of directions. Kantorowicz, a spokesman of the American realists, has levelled several charges against them. His contention is that the realists confuse natural and cultural sciences. Natural science deals only with real events governed by law of nature. Cultural sciences deal with human actions and are governed by laws of men and those actions can either be lawful or unlawful. As a matter of fact, they are more often unlawful. It is precisely the existence of unlawful acts that makes legal science necessary. It alone prepares us to evaluate unlawful acts and that presupposes the knowledge of how they ought to have been. These unlawful acts are as real as the lawful acts. For this very reason, natural science which knows nothing of unlawful and therefore of unreal acts nor of unreal and unlawful acts, can teach us nothing decisive. Ours is a science that must learn to differentiate between lawful and unlawful acts, which must be able to judge the unlawful ones and therefore must previously know the unreal acts which ought to have been real. The natural science which a realist should study is that part of astronomy which might teach us how stars ought to move and they move and choose to violate the laws of

celestial mechanics. Unfortunately, such a branch of astronomy has not been developed. If a person actually develops it, he would probably look to legal science for guidance, not vice versa.

The realists have been accused of confusing explanation and justification. If legal science were an empirical science, the chief method would be explanation through cause and effect. If it were a rational and normative science, its chief category would be justification through reason and consequence. Genetic explanation and normative justification should be kept apart. This is one of the most significant lessons of modern epistemology. It may be sense or nonsense to explain with Jerome Frank that the "childish" desire to attribute inviolable certainty to law is caused by a "father-complex". The truth or untruth of that alleged attribution is perfectly independent of its psychoanalytic or any other genetic explanation. Of course, the genetic method may be used as a tool in the service of the normative method and the vice versa.

The realists create a confusion between law and ethics. That is the reproach which the realists make to the classical, normative conception. Their misgivings are due to their own mistakes, their confusion of legal with moral norms. The former requires some external behaviour and can be complied with whatever may be the motives. The latter always takes notice, for example, of a selfish or altruistic aim.

The realists fail to distinguish between realities and their meaning. The lawyer is concerned with the meaning of observable realities, but meanings are not observable and still less tangible. It is the history of law that finds its interest in observable and unobservable facts. Much of the work of the realists is nothing but contemporary American legal history.

The realist confusion is between the concept and one of the elements which compose that concept. If the law is what courts of law do, one would prefer to say that religion is what the universities teach, medicine is what the doctor prescribes, art is what the artist produces and shoes are what the shoemaker makes. All this is putting the cart before the horse. Law is not what

the courts administer but courts are the institutions which administer the law.

The realists confuse cases and case law. The realist movement could make progress only in a case law country because there the law appears to be a heap of decisions and therefore a body of facts. However, the cases themselves are not binding. They are not the case law. Only the *rationes decidendi* are binding. These cannot be arrived at by an inductive method. They should be construed by purposive interpretation and in turn be generalised and fixed into the whole body of law that is more or less a system. The system into which these are administered is the case law and therefore something quite different from a mere fact that could be an object of empirical research. The entire temple of case law is erected upon a rule and not upon a fact. Those who deny that rules are binding, can hardly admit the binding force of precedents which they profess to worship.

The critics of American realism point out that the followers of the realist school put too much emphasis on the uncertainty of law. Law is not always uncertain and there is so much in the whole of the legal system which makes law certain. A lot of transactions are carried out everyday with the certainty of law. Otherwise, the work of society will come to a standstill. The advocates of the realist approach have exaggerated the human factor in judicial decisions. The background of every judge who gives the decision has some effect on it but that is not much. He has to base his decision on the law as a whole. The scope for personal discretion is not much.

The approach of American jurists is conditioned by the circumstances prevailing in that country and what they have said is not capable of universal application. The realists have undermined the importance of the legal principles and rules. They regard law as a jumble of unconnected decisions. In their eyes, "law never is, but is always about to be." Their view is that law cannot be predicted. Law is merely a series of application and execution. That is not correct. The very use of the term application shows the prior existence of the principles and rules. Moreover, they concentrate only on litigation although there is that part of law which never comes before the courts.

## Estimate

Lord Lloyd writes that the realists have done good work in emphasising both the essentially flexible attitude of the judiciary towards developing precedent, even within the four corners of a rigid doctrine of precedent and the operation of concealed factors in judicial law-making. The realists have played their part in bringing about a changed outlook and attitude towards the legal system and the function of the law and the legal profession in society which has made itself felt in all but the most traditionalist of the law schools of the common law world. (*Introduction to Jurisprudence*, p. 459).

## SUGGESTED READINGS

- |                        |  |
|------------------------|--|
| Abraham, H. J.         | : <i>The Judicial Process</i> , 3rd ed, New York and the Oxford University Press, 1976.  |
| Arnold, T. W.          | : <i>Symbols of Government</i> , Yale University Press, 1935.  |
| Beutal, F. K.          | : <i>Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science</i> , University of Nebraska Press, 1957. |
| Bodenheimer, E.        | : <i>Jurisprudence</i> , Harvard University Press, 1962.   |
| Cardozo, B. N.         | : <i>The Growth of the Law</i> , Yale University Press, 1924.  |
| Cecil, H (Leon, H. C.) | : <i>The English Judge</i> , Hamlyn Lectures, Stevens and Sons Ltd., 1970.   |
| Dias, R. W. M.         | : <i>Jurisprudence</i> , London, 1976.   |
| Frank, J. N.           | : <i>If Men were Angels: Some Aspects of Government in a Democracy</i> , Harper & Bros., New York, 1942.                           |
| Frank, J. N.           | : <i>Courts on Trial, Myth and Reality in American Justice</i> , Princeton University Press, 1949.                                 |
| Frank, J. N.           | : <i>Law and the Modern Mind</i> , English ed., Stevens & Sons Ltd., 1949.   |
| Friedmann, W.          | : <i>Legal Theory</i> , Stevens & Sons Ltd., 1960.   |
| Garlan, E. N.          | : <i>Legal Realism and Justice</i> , Columbia University Press, 1941.  |
| Gray, J. C.            | : <i>The Nature and Sources of the Law</i> , 2nd ed, R. Gray, The Macmillan Co., New York, 1921.                                   |
| Hart, H. L. A.         | : <i>The Concept of Law</i> , Oxford, Clarendon Press, 1961, reprinted 1975.   |
| Jolowicz, H. F.        | : <i>Lectures on Jurisprudence</i> , ed. J. A. Jolowicz, The Athlone Press, 1963.  |
| Jones, J. W.           | : <i>Historical Introduction to the Theory of Law</i> , Oxford, 1940.  |
| Kelsen, H.             | : <i>General Theory of Law and State</i> , trans. A. Wedberg, Harvard University Press, 1949.                                      |

- Llewellyn, K. N. : *Jurisprudence: Realism in Theory and Practice*, University of Chicago Press, 1962.
- Llewellyn, K. N. : *The Bramble Bush*, Columbia University School of Law, 1930.
- Llewellyn, K. N. : *The Common Law Tradition, Deciding Appeals*, Little, Brown & Co, 1960.
- Lloyd, D. : *Introduction to Jurisprudence*, Fourth Ed., Stevens & Sons Ltd., 1979.
- Lloyd, D. : *The Idea of Law*, Penguin Books Ltd., 1964.
- Marke, J. J. (Ed.) : *The Holmes Reader*, Oceana Publications, 1955.
- Paton, G. W. : *A Text Book of Jurisprudence*, Fourth Ed, G. W. Paton and D. P. Derham, Clarendon Press, Oxford, 1977.
- Patterson, E. W. : *Jurisprudence*, The Foundation Press Inc., 1953.
- Paul, J. : *The Legal Realism of Jerome N. Frank*, Martinus Nijhoff, The Hague, 1959.
- Pound, R. : *The Ideal Element in Law*, University of Calcutta, 1958.
- Radin, M. : *Law as Logic and Experience*, Yale University Press, 1940.
- Robinson, E. S : *Law and Lawyers*, The Macmillan Co., New York, 1935.
- Rumble, W E : *American Legal Realism, Skepticism, Reform and the Judicial Process*, Cornell University Press, 1968.
- Schubert, G. and Danielski, D (Eds ) : *Comparative Judicial Behaviour*, Oxford University Press, 1970.
- Shetreet, S. : *Judges on Trial*, Ed. G. J. Borrie, North Holland Publishing Co, 1976.
- Stone, J. : *Legal System and Lawyers' Reasonings*, Stevens & Sons Ltd, 1964.
- Tapper, C. F. H. : *Computers and the Law*, Weidenfeld and Nicolson, 1973.
- Twinning, W. : *Karl Llewellyn and the Realist Movement*, Weidenfeld and Nicolson, 1973.
- Ulman, J. N. : *A Judge Takes the Stand*, Alfred A. Knopf, 1933.
- Weyrauch, W. O. : *The Personality of Lawyers*, Yale University Press, 1964.

## XXVIII

### THE SCANDINAVIAN REALISTS

The view of Prof Dias is that there is hardly a "school" of Scandinavian realism. The individuals who are thought to belong to this group, show important differences among themselves. However, they agree in the main in denying the possibility of a science of justice or values. To them, these are purely subjective reactions, or else reflective of class or political ideology. It is not possible to construct a science on such a basis. (*Jurisprudence*, p. 642).

While the American realists were practising lawyers or law teachers who sought to approximate legal theory to legal practice, the Scandinavian jurists approached their tasks on a more abstract plane and with the training of philosophers. The Scandinavian realism has been described as "metaphysics-sceptical". It is essentially a philosophical critique of the metaphysical foundations of law. It is couched with a distinct continental flavour in its critical and often abstract discussion of the first principles. The Scandinavian realists have played a vital but important part in the total rejection of natural law philosophy and of any absolute ideas of justice as controlling and directing any positive system of law. The Scandinavian realists are relativists. They deny that rules of legal conduct can be compellingly deduced from immutable and inalienable principles of justice. The realist movement in Scandinavia looks to Hagerstrom as its spiritual father, but its important exponents are Olivecrona, Ross and Lundstedt.

In the words of Passmore, J: "No one (of Lundstedt, Olivecrona and Ross) is wholly self-contained. To understand them or effectively criticise them, one must constantly return to Hagerstrom. They presume the substantial truth of his subtle and detailed analysis."

*Hagerstrom (1868-1939)*

Axel Hagerstrom was not a lawyer but a philosopher whose attention was directed to law and ethics as particularly fertile

sources of metaphysics. His aim was to destroy transcendental metaphysics and he started with law. He declared: "All metaphysical concepts are sham concepts." They are "mere word-play". Legal philosophy for Hagerstrom is a sociology of law without empirical investigation but built upon conceptual, historical and psychological analysis. Much of his writing is a critique of the errors of juristic thought.

*Empirical basis of rights.*—As regards the method of Hagerstrom, he first reviews the attempts that have been made to discover the empirical basis of a right and dismisses each one of them. According to him: "The factual basis which we are seeking cannot be found either in *protection guaranteed* or commands issued by an external authority." His conclusion is that there are no such facts. The "idea" has nothing to do with reality. Its content is some kind of supernatural power with regard to things and presents. Hagerstrom sought a psychological explanation for a right. To quote him: "One fights better if one believes that one has right on one's side." It is clear from the writings of Hagerstrom that though rights may not exist, they are useful tools of thought.

*Historical basis of right.*—Hagerstrom also investigated the historical basis of the idea of a right. For that purpose, he made extensive study of Greek and Roman law and history. His studies were conceived to demonstrate that the framework of the *jus civile* was a system of rules for the acquisition and exercise of supernatural powers. He believed that modern law is also a ritualistic exercise. One thinks of the legal oath, the black cap, the wedding ring or the coronation ceremony. *Ritual is to law as a bottle is to liquor.* You cannot drink the bottle, but equally you cannot cope with liquor without the bottle. There is a danger in assimilating legal with ritual symbols, for ritual can only be understood if the beliefs underlying it are investigated, but legal symbols perform a *function* and are not just concerned with beliefs.

*Objective values* —Hagerstrom denied the existence of objective values. It appeared to him that there were no such things as goodness and badness in the world. The words represent emotional attitudes of approval and disapproval towards certain facts and situations. The word "duty" expresses an idea, the association



of a feeling of compulsion with regard to a desired course of conduct. There is no possibility of any science of the "ought". All questions of justice, aims, purposes of law are matters of personal evaluation. They are not susceptible to any scientific process of examination.

Hagerstrom examined the concepts of classical Roman law and came to the conclusion that those were rooted in magical beliefs. They were developments of the primitive belief in the power of words to affect happenings in the world of facts. The concept of obligation was a magical bond giving power to the creditor over the debtor. Power over property, dominium or ownership was also a magic power. The mode of conveyance was a ceremony based on magic. Law starts in religion and the monopoly enjoyed by the priestly class in early law is evidence of the idea that law is based on magic.

It is possible that Hagerstrom was making too much of a point which has some substance. It is probably true that adherence to form and ritual is rooted in word-magic, but how far Roman law should be interpreted along such lines is a matter on which opinion should be reserved. Word-fetishism is a habit that is easily formed. The ground for belief in the word magic is prepared very early and during the most receptive period of consciousness. In so far as law gives a person power to control property and the actions of other persons, it is not surprising that it should have become associated with word-magic from the earliest times. To put the machinery of law into operation, the proper incantations have to be suffered. New uses are found for the original forms and they keep formality and ritual alive long after the inner belief in word-magic drops out. According to Hagerstrom, the interpretation of a classical law on the basis purely of word-magic is questionable.

*Olivecrona (1897—)*

*Law.*—Prof. Olivecrona did not define law. To quote him: "I do not regard it as necessary to formulate a definition of law." Again, "a description and an analysis of the facts is all that will be attempted". If one seeks to investigate the nature of law, it begs the question to begin by assuming what it is. He insists that facts must be examined first. The method of identifying

these "will be simply to take up such facts as are covered by the expression rules of law."

*Binding force of Law.*—There is a lot of concern about the validity of law. Olivecrona approaches it from the angle of bindingness. Law has "binding force" in so far as it is valid. An invalid law is not binding. There is no such thing as "the binding force behind law". Many attempts have been made to find out where the binding force resides. Natural law lawyers have asserted that it lies in natural law. If asked why natural law is binding, the answer is a confession of faith. Natural law is said to be binding *per se*. Morality cannot be substituted in place of natural law, as law is treated as binding whether or not it is consistent with morality.

Another view is that the binding force of law is "the will of the State". This is imaginary as the will of the State as distinct from the wills of individuals is a myth. The question is whether any individual or group of individuals is discoverable in whose will the binding force of law resides. The answer must be in the negative. It is also fictitious to imagine that the binding force rests in the wills of legislators or citizens collectively. Such persons have other matters to think of than willing laws or their binding force.

The binding force of law is also not derived from unpleasant consequences which follow if law is broken. The reason is that unpleasant consequences follow in a host of situations which have nothing to do with law. Likewise, there are occasions when law is treated as binding although unpleasant consequences do not follow. A person may commit a breach of the law and still go undetected.

Prof. Olivecrona rejects the idea of "the" binding force of law as illusory and meaningless. It is not an observable fact in the milieu of society. "The" binding force of law is a mirage of language. It "exists" only as an idea in individual minds. Most people have a feeling of being bound by law which is different from saying that there is some impalpable binding force existing somewhere outside the mind. What requires to be explained is the feeling of being bound.

According to Olivecrona, the feeling of being bound stems from the psychological associations connected with this mode of expression by certain agencies. The feeling of being bound by "law" is psychologically associated with certain agencies when they follow certain procedures, together with the publication of law-texts through certain media. Law is a set of "independent imperatives" prescribed by these agencies. Law prescribes models of conduct and consists of "ought" propositions.

*Rights.*—Olivecrona does not dismiss the idea of rights altogether. However, he calls it a "hollow" word. A court could pronounce on a factual situation without calling "right" in aid. The proof of a right is accomplished by proving certain facts or events. Those facts are called "title".

According to Olivecrona, the idea of a "right" connotes a multitude of other ideas relating to behaviour patterns, not only for the "possessor of the right" but also of other persons. It implies directives as to how the right-bearer and others can and should act. The conclusion of Olivecrona is that "law is nothing but a set of social facts" based on the application of organised force.

The view of Prof. Dias is that some people are left with a feeling of dissatisfaction after reading the exposition of Olivecrona. Its very simplicity raises a doubt. However, the view of Dias is that the commonsense which Olivecrona brings to bear in his discussions is the best feature of his work. The clear pages of Olivecrona's presentation are preferable to the turgid complexities of many another.

Prof. Dias also points out that if a person searches the book of Olivecrona for guidance in the solution of legal problems, he will fail. There is no hint of values or other such considerations from which law draws its vitality. Prof. Dias further says that a person should not be criticised for not having said something which he never set out to say and which he would not have denied. The object of Olivecrona was limited to a formal analysis of law as it is. The picture of law which emerges is that it consists largely of propositions phrased in an imperative form and emanating from certain agencies. Although Olivecrona has stated at many places that law is nothing but a set of social facts, he does

not explain in his book what he means by "fact". Law also provides a model of behaviour which presumably is a social fact.

The view of Prof. Dias is that the chief merit of the work of Olivecrona is that he destroyed many traditional myths concerning law, e.g., binding force and command. He has given a moderate, sane and commonsense approach to some highly abstract problems of legal philosophy. His approach should not be regarded as self-sufficient, but it is an invaluable corrective to some others. (*Jurisprudence*, p. 648).

Lord Lloyd observes that Olivecrona was mainly concerned to show that there is nothing mystical about the working of a legal system and there is no need to rely on fictitious entities or concepts such as the State or the binding validity of law. (*Introduction to Jurisprudence*, p. 578).

Olivecrona's works can never be said to have lost all their teeth. He deserves the credit for his utter disregard of the superstition that law emanates from a god. For him, every rule of law is a creation of men. The rules have always been established through legislation, or in some other way, by ordinary people of flesh and blood. Another great merit of his work lies in his reversal of the general notion of moral standards as embodied in law by the idea that it is moral ideas that are themselves largely determined by law. There are some moral feelings which are natural phenomena such as love and compassion, but these are inadequately strong to produce the restraints necessary for civilised life. To quote Olivecrona: "Law certainly cannot be a projection of some innate moral convictions in the child or adolescent, since it existed long before he was born. When he grows up and becomes acquainted with the conditions of life, he is subjected to its influence. The first indelible impressions in early youth concerning the relations to other people are directly or indirectly derived from the law. But the effect is not only to create a fear of the sanctions and cause the individual to adjust himself so as to be able to live without fear. The rules also have a positive moral effect in that they cause a deposit of moral ideas in the mind." (*Law As Fact*, pp. 151-156).

Ross (1899—)

Alf Ross is a Danish jurist. He admits the normative

character of law. He distinguishes between laws which are normative and statements about laws in books which are descriptive. He confines his attention to particular legal orders. He maintains that laws need not be interpreted in the light of social facts but he is concerned with the problem of validity. He tends to highlight the position of courts.

*Valid Law.*—Ross does not seek to reduce all law to sociological phenomena. His conclusion is that “valid law” means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action. From here Ross moved to a position which as formulated in his book, *On Law and Justice*, was narrow and less tenable and hence criticised. Ross formerly held that the validity of law could properly be considered only from one point of view viz., as a scheme of interpretation enabling us to comprehend and within such limits as are practicable, to predict the activities of judges. Accordingly, he asserted that a legal norm such as a statutory rule was primarily a directive not to the population at large, but to the judge. In his later book *Directives and Norms*, he shifted his ground somewhat and countered some of the criticism against his original view. He now differentiates a logical and psychological point of view. Legal rules are rules about the exercise of force and as such are directed to officials. Their observance is based on “the experience of validity.” A statutory prohibition against murder is *implied* in the rule directing the courts and other administrative agencies to deal with any case of murder brought before them in the requisite manner. Logically, the rule of substantive law or primary law has no independent existence. But, “from a psychological point of view... there do exist two sets of norms.” For “rules addressed to citizens are felt psychologically to be independent entities which are grounds for the reactions of the authorities.” These primary rules must be seen as “actually existing norms, in so far as they are followed with regularity and experienced as being binding.” What Ross now suggests is that there is “no need” to describe two sets of directives, one to the population at large and the other to the courts, for the former can be understood from the latter. “To know these (secondary) rules is to know everything about the existence and content of law.”

Ross now recognises the social dimensions of law. What he now says in *Directives and Norms* is that as a matter of juristic precision, it is possible to reduce all laws to directions to officials. But he is admitting that this is not how society functions. A reference to the psychological existence of two sets of directives is a recognition that the behaviour and feelings of *all* members of society are the "social facts" required to determine the existence of rules of law. Ross now accepts what he earlier scorned in Olivecrona as "psychological realism". When Ross refers to "all members of society", it must be noted that he qualifies this by limiting his norm to those to whom it applies. "Thus the directive that shops are to be closed at a certain hour relates only to those members of society who are shopkeepers.

Neither in his book *On Law and Justice* nor in his book *Directives and Norms*, Ross has limited himself to a purely behaviouristic interpretation of judicial or social activity. With reference to the judge, Ross has insisted that "a behaviouralist interpretation achieves nothing", but one must take into consideration his "ideological" or "spiritual" life. Only on the hypotheses of the allegiance which the judge feels towards the Constitution, its institutions and the traditionally recognised sources of law, is it possible to interpret the changing judicial reactions as a coherent whole as regularities constituted by an ideology. The future behaviour of the courts cannot be predicted on the basis of past decisions alone. Judicial regularity is not external, habitual and static, but rather internal, ideological and dynamic.

*Norm.*—According to Ross: "*A norm is a directive which stands in a relation of correspondence to social facts.*" To say that a norm exists means that a certain social fact exists. This in turn means that the directive is followed in the majority of cases by people who feel bound to do so. The principal feature of legal norms is that they are directives addressed to courts. A norm may derive from a past decision, but all norms, including those of legislation, should be viewed as directives to courts. The judgment or order of the court then forms the basis for action by the State which is a "monopoly of the exercise of force." It follows from this that norms directed at individuals with regard to behaviour are only "derived and figurative."

Norms of law may be divided into "norms of conduct" which deal with behaviour and "norms of competence or procedure" which direct that norms brought into existence according to a declared mode of procedure shall be regarded as norms of conduct. These norms of competence are indirectly expressed norms of conduct.

Norms are operative "because they are felt by (the judge) to be socially binding and therefore obeyed". A norm is "valid" if a prediction can be made that a court will apply it. Validity is not "all or nothing" concept as it is with other writers. The degree of predictability that a norm will be applied determines the degree of its validity. "The degree of probability depends on the material of experience on which the prediction is built (sources of law)." Where the probability is high because the basis is a statute or an established precedent, the degree of validity of a rule is high. Where the probability is low because there is no decisive authority, the degree of validity is low.

*The "Verifiability" Principle.*—Ross was particularly influenced by logical positivism. In his book *On Law and Justice*, he wrote that "there is only one world and one cognition. All science is ultimately concerned with the same body of facts and all scientific statements about reality—that is, those which are not purely logical, mathematical—are subject to experimental test." He regarded the doctrinal study of law as "an empirical social science". Olivecrona and Lundstedt were not so influenced. Nevertheless, Ross is open to the criticisms that have been levelled at early logical positivism. The view that meaning is given by factual verifiability and therefore any proposition which is not verifiable is meaningless or nonsense has difficulties. The word "nonsense" is itself a highly metaphysical concept. It was realised that this would not do. It is a pity that the Scandinavian writers neglected the later works of Wittgenstein, in which he exposes the errors which he earlier shared with others, in attributing a single function to language, to which all propositions must conform in order to make sense at all.

*"Reductionism" and Legal Concepts.*—Ross is involved in a fallacy once associated with logical positivism, that of assuming that concepts can always be reduced by analysis to a series of factual

propositions to which they are equivalent and for which they can be substituted. Hence it was thought at one time that all the so-called fictional entities of philosophy could be spirited away by this process. Unfortunately, it later became apparent that this form of reductionism would not even work in regard to such simple everyday concepts as "England" or "France" in such a sentence as "England declared war in 1939". It will be found that no amount of conversion into factual statements will altogether eliminate the hard core of such concepts as rights and property as such reduction ignores the normative factor.

The criticism originally levelled at Ross that he ignored the regulative function of norms by saying that they are only addressed to courts was partly met by him in his later book. However, his continued insistence that only the former (courts) matter and not the individuals still underplays the regulative function. To admit, as he now does, that norms directed at individuals also exist, thereby implying that they too are social facts, dilutes the foundations of his structure. The thesis that there can be degrees of validity follows from an identification of validity with eventuality, what actually happens. That is not legitimate. The closely related point is his adoption of an exclusively descriptive point of view, but the resulting picture is unsuited to a point of view of a legislator or judge. A judge can hardly be predicting his own feeling or behaviour. It is unrealistic to suggest that validity has no significance for him.

*A.V. Lundstedt*

Lundstedt rejects everything normative, including the entire concept of justice which he identifies with the metaphysical. His argument is that any attempt to develop law on the basis of the commonsense of justice assumes that natural justice represents a kind of "material law" underlying the actual legal system. This he dismisses as non-existent metaphysical. For him, everything that is not a physical fact is a pure fantasy. All concepts such as rights and duties are dismissed as unrealistic. That applies to legal rules also. They are mere labels, unreal superstructure on the legal machinery. Lundstedt writes: "The principal argument in my criticism of legal ideology is that the entire substratum for legal ideology, the so-called material law and its basis natural



justice, lacks the character or reality; that accordingly, even legal rights, legal obligations, legal relationships and the like lack such a character; that the commonsense of justice (the feeling or sentiments of justice) far from being able to support the material law, on the contrary receives its entire bearing through the maintenance of law i.e., legal machinery which takes the commonsense of justice (the feeling of justice) into its service and directs it in grooves and furrows advantageous to society and its economy, and that consequently legal ideology does not perceive and cannot perceive those realities appertaining to the legal machinery such as they are, but places them right on their head." (*Legal Thinking Revised*, p. 53).

In his denunciation of the concepts of rights and duties and rejection of transcendental ideas of justice, Lundstedt is one with the other Scandinavian realist jurists. His rejection of "the method of justice" is the characterisation and condemnation of all traditional jurisprudence.

According to Lundstedt, one of the greatest mischiefs of traditional jurisprudence is to have regarded the sense of justice or right as encouraging and guiding the law, but in fact feelings of justice are guided and directed by laws as enforced or maintained. Law is nothing but the very life of mankind in organised groups and the conditions which make possible peaceful coexistence of masses of individuals and social groups and the cooperation for other ends than mere existence and propagation. At any particular time and in any particular society, it is determined by "social welfare." The "method of social welfare" is a guiding motive for legal activity. It means in the first place the encouragement in the best possible way of that according to what everybody standing above a certain minimum degree of culture, is able to understand. That consists of such basic requirements of human beings as "suitable and well-tasting food, appropriate and becoming clothes according to one's own or general taste, dwellings furnished in the best and most comfortable way, security of life, limb and property, the greatest possible freedom of action and movement along with limitation of the amount of work a person may be required to do within a specified period of time, possibilities of education etc. That includes all conceivable material comfort as well as protection of spiritual interests."

According to Lundstedt, all other jurists have followed the road of legal ideology or the method of justice. That means that they have relied in one way or another on material objective law, underlying the actual legal system and depending on the common-sense of justice to develop the law and to fill the gaps in the legal system. This is condemned by him both as metaphysical nonsense and as an attempt to invoke natural law or justice to supply an objective valuation in what can only be purely subjective, since for them value judgments depend purely on individual feelings and emotions and are incapable of scientific objectivity. Lundstedt directs an impassioned onslaught on many of those modern thinkers whose thought might be believed to resemble his own, as for instance, the utilitarians, the sociological jurists and the American realists. According to Lundstedt, jurisprudence must be a natural science, based on observation of facts and actual connections and not on personal evaluations or metaphysical entities. Science has not so far progressed sufficiently in this field to enable us to establish or demarcate those connections with precision. Hence the need for what Lundstedt calls "constructive" jurisprudence which has to work practically on the hypotheses of certain social evaluations such as that legal activities are indispensable for the existence of society and their aim must be to produce the most frictionless functioning of the legal machinery. Lundstedt maintains that his approach differs from that of Bentham and Pound as he proceeds not on an ideological basis but on arguments based solely on social realities, that is, on people as they are actually constituted. The "social welfare method" propounded by Lundstedt is quite distinct from such common ideas as the needs of society or social policy, as it means nothing but what is actually considered useful to men in society, with the way of life and aspirations that they have at a particular time. That implies the encouragement in the best possible way of what people in general actually strive to attain and not what they ought to strive for. As knowledge increases, legal activities may eventually be able to be based on a legal science which has a more or less complete knowledge of the facts and which can establish social evaluations on that foundation.

Lundstedt's devotion to actual aspirations presumably adds up to the dominant views of the bulk of society and seems to leave

but little, if any, scope for the reforming impulses of a minority in advance of the sluggish opinions of the mass or scope for the possibility of moral pluralism.

According to Lundstedt, criminal law exists not so much to deter criminals but to foster the moral instincts against crime and it does this by the regular enforcement of sanctions. He dismisses as a "ridiculous idea" all the pious phrases about improving the criminal morally or socially, for the actual effect, "the naked reality" of the penalties imposed, is to "break down the criminal".

Although Lundstedt castigates Pound's jural postulates as nothing more than phrases heaped upon phrases without the possibility of finding any line of thought, it is difficult to see why his own hypotheses as to the basis of the legal system are not equally *a priori*, drawn as they are not from sociological research, but from personal reflection and individual evaluations. If it is true that Pound discusses law "in complete abstraction from our experience of it, the same criticism applies to the formulation of the social welfare method by Lundstedt. In natural and in other science, hypotheses are only valuable in so far as they can be and are tested against verifiable observations."

*Criticism.*—It is worthy of notice that the critical aspects of the Scandinavian realists are more significant than their positive achievement. Their main contribution has been to pursue the detection of open or hidden legal ideologies beyond the general criticism and condemnation of natural law rules into the positivist concepts of command, sovereignty, rights and duties. The Scandinavian realists represented an idea that the legal order should always be subjected to certain scales of values which in turn should be assessed not in absolute terms but with regard to the social needs changing with times, nations and circumstances. Whether law is considered as a "fact" or as a machinery in action, or in any other form and manner, it is directed to certain ends.

*Scandinavian and American Realism.*—The Scandinavian realists share with sociological jurists a weakness for *a priori* assertions, while at the same time insisting on the need for basing the law on the needs of social life. They linked this attitude with varying degrees of hostility to all conceptual thinking which they stigmatize

as metaphysical or ideological. The American realists are not much interested in general theorising about law. Although they may share with the Scandinavian realists the feeling that rules do not decide cases, they do not altogether reject the normative aspect of legal rules. What they are mainly interested in is the practical working of the judicial process, whereas the Scandinavians are more concerned with the theoretical operation of the legal system as a whole. Although the Scandinavians are the most extreme of empiricists, it is the Americans who primarily stress the need for factual studies in working out proper solutions for legal problems. The Scandinavians appear to rely mainly on an argument of *a priori* kind to justify legal solutions or developments. The view of Lord Lloyd is that for all its positivism, the Scandinavian movement remains essentially in the European philosophical tradition, whereas the American movement bears many of the characteristics of English empiricism. (*Introduction to Jurisprudence*, p. 583).

#### *Criticism of the Realists in General*

The realist approach can be criticised on many grounds. The realists have undermined the importance of legal principles and rules. They regard law as a jumble of unconnected decisions. For them, law never is, but is always about to be. They have been impressed by the variability of decisions and have come to the conclusion that law is not predictable at all but it is only a series of applications and executions. Their main concentration is on litigation but there is a great part of law which does not come before the courts. The realists launched a vigorous attack against juristic complacency and the myth of "certainty". However, in actual practice we find a large measure of certainty and very many transactions are regulated on that basis. The realists have exaggerated the human factor in judicial decisions. It is true that the human factor plays a part in arriving at decisions, but that does not mean that judicial decisions are the result only of the personality of the judge. The approach of the American realists is based on their own local judicial setting and does not give a universal method. It can be applied only in a society where the social forces had their play in law-making. In societies where the will of the legislator dominates every sphere of law, as in totalitarian States, the realist approach cannot be adopted. The analysis

of the Scandinavian jurists does not suffer from these weaknesses. According to Olivecrona, the nature of law has universal validity.

The realists have undermined the importance of the legal principles and rules. They regard law as a jumble of unconnected decisions. In their eyes, "law never is, but is always about to be." Their view is that law cannot be predicted. It is merely a series of applications and executions. However, this is not correct. The very use of the term "application" shows the prior existence of principles and rules.

### *Contribution of the Realists*

The realist movement has made a valuable contribution to jurisprudence. Its approach to law is in a positive spirit. It is not concerned with any theory of justice or natural law. It demands a comprehensive approach and examination of all the factors which lead to decisions. The realists have goaded on the lawyers and judges to realise the importance of their work and not to do their work blindly. Jerome Frank writes: "It has contributed in parts to the liberation of judges...from enslavement by unduly rigid legal concepts, caused those judges to ground their reasoning on broader and more human rule premises". The view of Julius Stone is that the realist movement is a gloss on the sociological approach. What is required is that it should be a balanced one and then alone it will be a help to solve legal problems. According to Allen: "The realist school appears as another *avatar* on the sociological jurisprudence." Friedmann writes that the realist approach is "an attempt to rationalise and modernise the law—both administration of law and the material for legislative change—by utilising scientific methods and the results reached in those fields of social life with which this social law is inevitably linked."

## SUGGESTED READINGS

- Castberg, F. : *Problems of Legal Philosophy*, 2nd ed , Oslo University Press : Allen & Unwin Ltd., 1957.
- David and Brierly : *Major Legal Systems of the World*, 1968
- Dias, R W.M. : *Jurisprudence*, London, 1976.
- Finch, J.D. : *Introduction to Legal Theory*, 2nd ed , Sweet & Maxwell Ltd., 1974.
- Hagerstrom, A. *Inquiries into the Nature of Law and Morals*, ed. K. Olivecrona, trans C.D Broad, Almqvist & Wiksell, Stockholm, 1953
- Hagerstrom, A. . *Philosophy and Religion*, 1964.
- Lloyd, D. : *Introduction to Jurisprudence*, 1979.
- Lundstedt, A.V. : *Legal Thinking Revised*, Almqvist & Wiksell, Stockholm, 1956
- Olivecrona, K. : *Interpretations of Modern Legal Philosophies*, ed. P. Sayre, Oxford University Press, New York, 1947.
- Olivecrona, K. : *Law as Fact*, Einar Munksgaard, Copenhagen; Humphrey Milford, London, 1939; reprinted Wildy & Sons, 1962; 2nd ed., Stevens & Sons Ltd., 1971.
- Olivecrona, K. . *Scandinavian Studies in Law*.
- Ross, A. : *Directives and Norms*, Routledge & Kegan Paul Ltd., 1968
- Ross, A. : *On Law and Justice*, Stevens & Sons Ltd , 1958.
- Ross, A : *Towards a Realistic Jurisprudence*, trans A I. Fausboll, Einar Munksgaard, Copenhagen, 1946.
- Stone, J : *Legal System and Lawyers' Reasonings*, Stevens & Sons Ltd , 1964.

## XXIX

### NATURAL LAW

In the words of Lord Lloyd of Hampstead, natural law thinking has occupied a pervasive role in the realms of ethics, politics and law from the earliest times. At some periods, its appeal may have been religious or supernatural, but in modern times it has formed an important weapon in political and legal ideology. It has afforded a valuable aid to the powers that be, desirous of justifying the existing law and the social and economic system it embodies. Natural law has often been pictured as an ideal system laid up in heaven of which positive law can be but an imperfect simulacrum. Natural law has been envisaged as a mere law of self-preservation, or as an operative law of nature constraining man to a certain pattern of behaviour. (*Introduction of Jurisprudence*, pp. 79-81).

Prof. R. W. M. Dias writes that natural law theory has a history reaching back centuries B. C. and the vigour with which it flourishes is a tribute to its vitality. There is no one theory of natural law and there are many versions of it. However, there is no other firmament of legal or political theory which is so jewelled with stars as that of natural law which scintillates with contributions from all ages. The term natural law has been understood to mean a variety of things to different people at different times viz., ideals which guide legal development and administration, a basic moral quality in law which prevents a total separation of the "is" from the "ought", the method of discovering perfect law, the content of perfect law deducible by reason and the conditions *sine quibus non* for the existence of law. On account of these differences, it is not always possible to classify a given writer as naturalist or positivist. There are wide differences among those who are normally classed as naturalists or positivists. Natural law thinking in one form or another is pervasive and is encountered in various contexts. Natural law theory has tried to meet the paramount needs of successive ages throughout history.

It figures prominently in offering help with two vital contemporary problems viz., the validity of the unjust law and the abuse of liberty. The constant readiness of natural lawyers to meet challenge is a tribute to the springs of their inspiration. (*Jurisprudence*, pp. 653-54).

Dr. W. Friedmann rightly points out that the history of natural law is a tale of the search of mankind for absolute justice and its failure. Again and again, the idea of natural law has appeared in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. The problem is as acute and as unsolved as ever. With changing social and political conditions, the notions on natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law. The object of that appeal has been the justification of the existing authority or a revolt against it. Natural law has fulfilled many functions. It was the principal instrument in the transformation of the old civil law of the Romans. It was used as a weapon by both sides in the fight between the Medieval Church and the German Emperors. In the name of natural law, the validity of international law was asserted. An appeal was made to natural law to defend individual freedom against absolutism. The judges of the United States appealed to the principles of natural justice while resisting the attempt of State legislation to modify and restrict the unfettered economic freedom of the individual. Natural law has helped various peoples and generations to formulate their ideals and aspirations. At different times, natural law has been used to support almost any ideology. However, the most important and lasting theories of natural law have been inspired by the ideal of a universal order governing all men and the inalienable rights of the individual. Through the theories of Locke and Paine, natural law has provided the foundation for the individualist philosophy of the American and other modern constitutions. (*Legal Theory*, pp. 43-45).

### Greece

Greek thinkers laid the basis of natural law and developed its essential features. Heraclitus laid the basis of natural law. He found it in the rhythm of events. This he termed destiny, order



and reason of the world. Nature is not just substance, but a relation, an order of things. The thought of an order of nature in conformity with law dawned as clear knowledge upon Grecian minds. This provided the basis for the Greek school of enlightenment (Sophists) which developed in the 5th century B. C. The contact between nature and institution is the most characteristic work of Greek enlightenment in the formation of conceptions. It dominated the whole philosophy of the period. If there is anything universally valid, it is that which is valid by nature for all men without distinction of people and time. What nature determines is justly authorised. Nature came to be opposed to the tyranny of man. Nature is something external, outside man. It is the order of things which embodies reason.

*Socrates.*—Socrates reflected upon that element which was the decisive factor in the culture of his time. He defined virtue, the fundamental ethical conception, as insight, in turn, as knowledge of the good, the concept of good with no universal content. One of the dictates of natural law is that authority and positive law should be obeyed. However, he did not argue blind adherence to positive law. That should be subjected to the critical evaluation in the light of man's insight.

*Plato.*—Plato laid the foundations for much of subsequent speculation of natural law themes. According to him, Gods gave to all men in equal measure a sense of justice and of ethical reverence so that in the struggle of life they may be able to form permanent unions for mutual preservation. He found the nature of practical life in primary ethical feelings which impel men to union in society and in the State. In the ideal State of Plato, each individual is given that role for which he is best fitted by reason of his capacities. His *Republic* is a constructive attempt to discover the basis of justice. The administration of justice is given to the philosopher kings whose education and wisdom is such that there is no necessity to link them up with a higher law.

*Aristotle.*—In his *Logic*, Aristotle sees the world as a totality comprising the whole of nature. Man is a part of nature in a twofold sense. On the one hand, he is a part of matter, part of the creatures of God. As such, he partakes of experience. Man is also endowed with active reason which distinguishes him

from all other parts of nature. He is capable of forming his will in accordance with the insight of his reason. It is the recognition of human reason as a part of nature which provides the basis for the Stoic conception of the law of nature. The Stoics develop this principle into an ethical one. Reason governs the universe in all its parts. Man, as a part of universal nature, is governed by reason. Reason orders his faculties in such a way that he can fulfil his true nature. When man lives according to reason, he lives "naturally". Thus, the law of nature becomes identified with a moral duty.

*Stoics.*—To the Stoics, the postulates of reason are of universal force. They are binding on all men everywhere. Men are endowed with reason, irrespective of nationality and race.

*Rome.*—The theory of Stoics exercised great influence upon the Roman jurists and some of them paid high tribute to "natural law". In the Roman system, the theory of natural law did not remain confined to theoretical discussions only. The Romans used natural law to transform their narrow and rigid system into a cosmopolitan one. Natural law exercised a very constructive influence on Roman law. The Romans had three divisions of law viz., *jus civile*, *jus gentium* and *jus naturale*. *Jus civile* or civil law of the Romans was for Roman citizens only. On the principles of natural law, the Roman magistrates applied those rules which were common with foreign laws to foreign citizens. The body of law which grew up in this way was called *jus gentium* and it became a part of Roman law. It represented the good sense and universal legal principles and conformed to natural law. Later on, *jus gentium* and *jus civile* became one when Roman citizenship was extended to all except a few classes of people. The Roman lawyers did not bother about the conflict between natural law and positive law. However, there were some jurists who considered natural law as superior to positive law but the majority of the Roman jurists did not enter into this problem.

Lord Lloyd writes that conquest and commerce necessitated the development of law which could be applied to foreigners. *Jus gentium*, the *jus civile* stripped of formalities and with cosmopolitan trimmings, was the result. (*Introduction to Jurisprudence*, p. 83).

Gaius wrote that all people who are governed by laws and customs applied partly their own law, partly law which is common to all mankind. The law which each people has made for himself is peculiar to that people and is called *jus civile*, the special law of the State, but that which natural reason has appointed for all men is in force equally among all peoples and is called *jus gentium*, being the law applied by all races.

*Cicero*.—Cicero wrote that law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason when firmly fixed and fully developed in the human mind is law. Since law is a natural force, it is mind and reason of the intelligent man, the standard by which justice and injustice are measured. While divine reason is inherent in the universe, it is more or less identified with the physical ordering of the universe. Man stands highest in creation by virtue of his faculty of reasoning and his welfare is the supreme purpose of creation. As welfare is the chief objective of creation, man should spare no efforts to help others.

Cicero not only held fast to the thought of a moral world order which determines with universal validity the relation of rational beings to each other, but also thought of the subjective aspect of the question in consonance with his theory that this command of reason is innate in all human beings equally and has grown with their instinct of self-preservation. Out of this natural law, the universally valid law which is above all human caprice and change of historical life, develop both the commands of morality in general and of human society in particular.

### *The Middle Ages*

*Aquinas*.—Throughout the Middle Ages, the theology of the Catholic Church set the tone and pattern of all speculative thought. Two vital principles animated medieval thought and those were *unity* and *supremacy of law*. Unity was derived from God and involved one faith, one Church and one Empire. The supremacy of law was not merely man-made but was conceived as a part of the unity of the universe. Catholic philosophers and theologians of the Middle Ages gave a new theory of natural law. They gave it a theological basis. Their views were logical and systematic. The views of St. Thomas Aquinas (1224/5-1274)

may be taken as representative of the new theory. His theory has to be set in the context of his time. There was a need for stability in a world emerging from the Dark Ages. The struggle between the Church and the State was beginning and there was the need for the Church to establish its supremacy by rational argument rather than by force. It was necessary for Christendom to unite in the face of the heathen menace and a need was felt for unifying Christian philosophy. Aquinas tried to meet all the three needs. In the doctrine of Aquinas, there is a connection between means and ends. There is a relation in the nature of things between a given operation and its result. Natural phenomena have certain inevitable consequences. Fire burns but it does not freeze. A tendency to develop in certain ways is naturally inherent in things. An acorn can only evolve into an oak and it will never evolve into a larch or pine. The appreciation of the relation between means and ends and the process of growth towards fulfilment is open only to intelligence and faculty of reason. An acorn does not think but man thinks. Man appreciates the relation between means and their ends. He also chooses for himself the ends which he wants and devises means of achieving them. A man in authority may decide that the health of society is an end worth achieving and then devise means to achieve the same and prescribe regulations for that purpose. Thus, laws consist of means of achieving ends. The relation between an end and the method by which its fulfilment is sought is initially conceived in the mind of the legislator. Those who are required to conform to his directions can also appreciate the connection by the exercise of their own reasoning faculties. According to Aquinas, law is "nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated." Man can control his own destiny to a large extent but he is subject to certain basic impulses which are the impulse towards self-preservation, the impulses to reproduce the species and rear children and the impulse to improve and to take such decisions as are necessary for the attainment of higher and better things. The basic impulses point in a definite direction which is not only survival and continuity but also perfection. They are a part of human nature and show that man is also limited by nature. The establishment of certain ends and the means of achievement

originated in the reason of some superhuman legislator. That is the eternal law which is "nothing else than the plan of the divine wisdom considered as directing all the acts and motions" for the attainment of the ends. Man is free and rational and capable of acting contrary to eternal law. That law has to be promulgated to him through reason. That is natural law. There is no need of promulgating natural law to other created things as they lack the intelligence of man. To quote Aquinas: "The natural law is nothing else but a participation of the eternal law in a rational creature." It is the dictates revealed by reason reflecting on natural tendencies and needs. "The primary precept of the law is that good should be done and pursued and evil avoided: and on this are founded all the other precepts of the law of nature." By reflecting on his own impulses and nature, man can decide what is good.

The nature of man is such that he is necessarily impelled to seek good in survival, continuity and perfection. He must do things to achieve them and not to frustrate them. To go against the ends is morally wrong. It is not wrong because God has forbidden the contravention of natural law. God has forbidden it because it is wrong which means contrary to reason by which God himself is bound.

According to Aquinas, mankind "ought not only to be multiplied corporeally, but also to make spiritual progress. And so sufficient provision is made if some only attend to generation while others give themselves to the contemplation of divine things for the enrichment and salvation of the whole human race."

Aquinas divided laws into four categories viz., law of God, natural law which is revealed through the reason of man, divine law or the law of scriptures and human laws. Natural law is a part of divine law. It is that part which reveals itself in natural reason. It is applied by human beings to govern their affairs and relations. The human law or positive law must conform to the law of the scriptures. Positive law is valued only to the extent to which it is compatible with natural law or in conformity with eternal law. The Church is the authoritative interpreter of the divine law. It is the authority to give verdict upon the goodness of positive law also.

The scheme of Aquinas dividing laws into four categories of eternal law, natural law, divine law and human law is regarded as the first of its kind in the history of jurisprudence. It combined ancient philosophy, the law of the Romans, the teachings of the Christian Fathers and contemporary pragmatism with consummate power and skill. Law was no longer the product of original sin. It became a part of the divine scheme. What is most striking is its uncompromising appeal to reason. Man was created so that he might strive towards perfection. Reason dictates that he has to be free. God cannot alter this state of affairs. To do so would contradict His own nature as God himself is bound by reason. The law of God was declared to be nothing else than the reason of divine wisdom. Christianity was said to be the supreme reason. Natural law furnishes principles rather than rules for detailed application. An interesting feature is the empirical approach to eternal and natural law. Inferences are drawn from human nature. Reason becomes the foundation for all human institutions. Social life is founded on human nature. Families and the State are necessary for the realisation of man's full potential and are thus natural institutions. An extension of this is the ideal of a single organisation of all mankind in a world State.

Aquinas tried to strengthen the authority of the Church by asserting that human dignitaries were responsible to the Church in matters relating to eternal law. The Church is the authoritative interpreter of divine law in the scriptures. The State existed before the Church and is itself a natural institution. It serves the common good and by means of its laws should bring about the conditions conducive to the proper development of man.

The test by which laws are to be judged is the following dictate: "Every human being has just so much of the nature of law as it is derived from the law of nature. If it departs from natural law on any point, it is no longer a law but a perversion of law." So far as human laws are founded on reason, there is a duty to obey them. If a law is unreasonable and unjust, no such duty arises. However, there may be subtle dictates of morality which enjoin obedience even to an unreasonable positive law. Unjust laws "do not bind conscience unless observance of them is required in order to avoid scandal or disturbance."

An unjust ruler may be overthrown unless revolution would create as bad or worse state of affairs than before. Sedition is a social evil and Aquinas warned against rebellion in circumstances which do not justify it.

The identification of natural law with reason was destined to bring about a separation of natural law from theology later on. After the Reformation, the Protestants denied the authority of the Church to interpret the law of God as man was said to have direct access to God through his own reason. Aquinas maintained that the use of things must be not by man for his own benefit but for the common good. He justified the difference between the rich and the poor and individual property.

Aquinas blended in a system of great logical power the austere ecclesiasticism of the Fathers of the Church and the political philosophy of Aristotle. In the struggle of political forces, his system vindicated the right of the Church to control the ecclesiastical appointments made by the Emperor.

For Aquinas himself, the law of nature was not merely a matter of expediency but it often deteriorated to that function in the controversies which accompanied the bitter struggle between the Pope and the Emperor for supremacy. The law of nature also served as a powerful weapon in the later struggle between the Catholics and the Protestants when either side appealed to it for the true interpretation of the Scripture or the right of the State to spiritual jurisdiction.

*Grotius.*—Hugo Grotius (1583-1645) gave classical expression to the new foundations of natural law as well as the principles of modern international law. According to him, the property peculiar to man is his desire for society, for a life spent in peace in common with fellowmen and in correspondence with the character of his intellect. The nature of human intellect desires a peaceful society and from that are derived the principles of natural law which are independent of divine command. To quote him: "*Natural law is so immutable that it cannot be changed by God himself.*" These principles of reason can be deduced in two different ways. One way is by examining anything in relation to the rational and social nature of man. The second way is by examining the acceptance of those principles among the nations.

On his principles of natural law, Grotius built his system of international law. The most fundamental of his principles is *pacta sunt servanda*, the respect for promises given and treaties signed. The other rules of natural law are respect for other people's property and the restitution of gain made from it, the reparation of damage caused by one's fault and the recognition of certain things as meriting punishment. Natural law also supplied the basis of more concrete political controversy. While Grotius stipulated the freedom of the seas as a principle of natural law, Selden maintained that natural law permitted private and public dominion over the seas. In the writings of Grotius, the idea of natural law assumed a constructive and practical function comparable to that which it did in the time of the Roman Empire. In both cases, principles partly deduced, partly observed as being of general acceptance, gave the basis. In course of time, natural law was reduced from a position of superiority over State practice to an empty formula.

According to Grotius, natural law is based on the nature of man and his inward need of living in society. Grotius called human nature as the grandmother, natural law the parent and positive law the child. Human nature impels us to desire a society. From this nature of human intellect which desires a peaceful society, are deduced the principles of natural law, which are quite independent of divine command. Natural law is immutable and cannot be changed by God himself.

*Pufendorf*.—Like Grotius, Pufendorf based natural law on the two sides of human nature which bid him to protect his personal property but not to disturb the peace of society. From this, Pufendorf derived the following maxim: "Let no one bear himself towards a second person so that the latter can properly complain that his equality of right has been violated in his case."

Wolff saw in the duty of self-perfection the principal command of natural law. The conditions of such perfection are provided by a benevolent sovereign who promotes peace and security. Natural law is a living force. Pufendorf, Wolff and Selden asserted the supremacy of the law of nature.

According to *Vattel*: "The law of nations is originally no other than the law of nature applied to nations." Thus, natural



law is necessary law and all nations are bound to observe it. It cannot be changed or abrogated. In spite of these assertions, natural law was relegated to a very low position by Vattel as compared with international law. He merely paid lip service to natural law and put emphasis on international law. According to him, all real international law was derived from the will of the nations.

### **Natural Law and Social Contract**

The ideas of natural law were used for a very different purpose in the English Revolution of 1688, the American Declaration of Independence and the French Revolution of 1789. The Renaissance and the Reformation paved the way for the spiritual emancipation of the individual. The expansion of commerce gave economic prosperity to the new middle class which became the moving spirit in the struggle for individual emancipation. Political absolutism looked for a justification of its claim to unlimited authority over the people. The legal construction used by both sides in the political struggle was that of social contract.

The use of social contract as a definite concept in political and legal controversy can be traced to Marsilius of Padua (1270-1343). The concept of social contract is that in the beginning men lived in a state of nature. They had neither any government nor any law. That state of nature was described by some as that of hardship and oppression while by some others as that of bliss and joy. Men entered into an agreement for the protection of their lives and property and thus society came into existence. They undertook to respect each other and live in peace. They entered into a second agreement by which the people who had united together earlier, undertook to obey an authority and surrender the whole or a part of their freedom and rights and the authority guaranteed every one of them the protection of life, property and to a certain extent, liberty. It was in this way that the government, sovereign or the ruler came into being. There are many implications of the theory of social contract. People are the source of political power. The concept of society of these exponents of social contract theory is individualistic. The important exponents of the theory of social contract were Grotius, Hobbes, Locke and Rousseau.

*Grotius.*—Hugo Grotius used the social contract for two purposes, internally for the justification of the absolute duty of obedience of the people to the government and internationally to create a basis for legally binding and stable relations among the States. He put forward social contract as an actual fact in human history. According to him, each people had chosen the form of government they considered most suitable for themselves by means of a social contract. Once the people transferred their right of government to the ruler, they forfeited the right to control or punish the ruler howsoever bad his government may be. Grotius denied that all government is for the sake of the governed. He vacillated on the question how far a ruler is bound by the promises made by him to his subjects. He was bound to admit that the ruler was bound by natural law which was valid even without promise and the keeping of promises is a permanent principle of natural law. Grotius was not able to explain this anomaly. His main concern was the stability and orderliness of international society. His theory of social contract served that purpose by stressing the equivalence of different forms of government established by different peoples, by freeing the ruler from any internal restriction or fetters and by stressing the absolute force of a promise once made.

*Hobbes.*—Thomas Hobbes (1588-1679) was the author of two books, *De Cive* (1642) and *The Leviathan* (1651). He lived during the days of the Civil War in England and hence was convinced of the great importance of State authority which he wanted to be vested in an absolute ruler. Hobbes acknowledged the authority of natural law but he understood it in a sense different from those writers for whom natural law was superior to positive law. He shifted the emphasis from natural law as an objective order to natural right as a subjective claim based on the nature of man and prepared the way for individualism in the name of "inalienable rights". He still acknowledged objective rules of natural law of an immutable character but he divested them of any practical significance by depriving them of sanctions. He understood by natural law not certain ethical principles but laws of human conduct based on observation and appreciation of human nature. For him, the chief principle of natural law was the right of self-preservation. This was connected with his view of state of

nature in which "men live without a common power to keep them all in awe, they are in that condition which is called war and such a war as is of every man against every man." In the state of nature, there was perpetual and devastating warfare which threatened everyone, but natural reason dictated to man the rule of self-preservation for which he tried to escape from the state of permanent insecurity. That he did by transferring all his natural rights to the ruler whom he promised to obey unconditionally. The individual transferred the whole of his natural rights to the ruler who became an absolute ruler. The subjects could not demand the fulfilment of any obligation by the ruler. The only condition was that the absolute ruler must keep order. Hobbes was against civil disobedience but where resistance was successful, the sovereign ceased to govern and the subjects were thrown back to their original position and then they could transfer their obedience to a new ruler. To quote Hobbes: "The obligation of subjects to the sovereign is understood to last as long and no longer than the power lasts by which he is able to protect them."

Hobbes enumerates 19 principles of natural law but they are shorn of all power. All law is dependent upon sanction. To quote him: "Governments without the sword are but words, and of no strength to secure a man at all." All real law is civil law. It is commanded and enforced by the sovereign. There is no distinction between State and society. There is no law between sovereign and subjects. All social and legal authority is concentrated in the sovereign. The Church is subordinated to the State. It is just like another corporation. The sovereign of Hobbes is not instituted and legitimised by any superior sanction like that of natural law or divine right. He is merely a utilitarian creation. Natural law was not a superior law.

According to Hobbes: "A law of nature (*lex naturalis*) is a precept or general rule found out by reason, by which man is forbidden to do that which is destructive of life, or takes away the means of preserving the same and to omit that by which he thinks it may be best preserved". The fundamental law of nature is that every man ought to endeavour to obtain peace as far as he has hope of obtaining it. When he cannot obtain it, he can seek and use all helps and advantages of war. The second

law of nature was that if others were willing to follow the same rule, man should be content with so much liberty against other men as he would allow to others against himself. The third law of nature was that men performed their covenants made. In that, law of nature was the fountain and origin of justice. According to Hobbes, injustice is nothing else than the non-performance of covenants. The nature of justice consists in the keeping of valid covenants which start with the constitution of a civil power sufficient to compel men to keep them.

According to Hobbes, the life of man in the state of nature was "solitary, poor, nasty, brutish and short". His theory was based upon the idea of force and compulsion. To quote him: "It is men and arms that make the force and power of the law." Natural law is little more than a fiction, ingeniously twisted to support a political dictatorship. Hobbes expressed the main precept of natural law in the form of man's right to self-preservation. He denied to the Church the authority to interpret the law of God. He gave all power to a utilitarian secular sovereign.

Hobbes was individualist, utilitarian and absolutist and all of these aspects had great influence upon the legal and political thought of the next few centuries. From his political and legal theory emerged the modern man who is self-centred, individualistic, materialistic and irreligious in the pursuit of organised power. His individualism linked him with Locke, his utilitarianism with Bentham and Mill and his absolutism with all the theories which stand for the enhancement of the powers of the State.

*Locke.*—John Locke (1632-1704) was the theoretician of the rising middle class which was individualistic and acquisitive and avoided conflict between ethics and profits. His ideas appealed to his generation and the following century. He restored the medieval concept of natural law in so far as he made it superior to positive law. He placed the individual in the centre and invested him with inalienable natural rights among which the right to private property was the most prominent. He used the social contract to justify government by majority which held the power in trust, with the duty to preserve individual rights whose protection was entrusted to them by individuals. Locke was the opponent of Hobbes. In place of the theory of absolutism of

Hobbes, he gave the theory of the inalienable rights of individuals. If Hobbes stood for authority, Locke stood for liberty.

Locke wrote after the Glorious Revolution of 1688 and justified the same. He adopted the individualistic premises of Hobbes but stated those values in terms of inalienable natural rights. The individual had a natural inborn right to "life, liberty and estate". He gave his chief attention to the right of private property. His state of nature is Paradise Lost. It was a state "of peace, goodwill, mutual assistance and preservation". In that state of nature, men had all the rights which nature could give them. What they lacked was organisation. The right of property existed prior to and independent of any social contract whose function was to preserve and protect not only the right to property but also other natural rights. The social contract of Locke performs two functions. By one contract, men agreed to unite into one political society and thereby create the commonwealth. A majority agreement is identical with an act of the whole society. The majority vote can take away property rights and other inalienable rights. After that, the majority vested its power in a government whose function is the protection of the individual. So long as the government is faithful to its pledge, it cannot be deprived of its power.

Locke appears to have gone back to a state of nature which was a state of peace, goodwill, mutual assistance and preservation. In that state of nature, all were equal and independent. No one was supposed "to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise maker, all the servants of one sovereign master, sent into the world by His order and about his business." In that state of nature, nobody could transfer to another more power than he himself had. Nobody had an absolute and arbitrary power over himself or over any other person, to destroy his own life or take away the life or property of another. A man cannot subject himself to the arbitrary power of another. He has no arbitrary power over the life, liberty or possessions of another. The limited power is given to the commonwealth for the good of society. The State can never have a right to destroy, enslave or impoverish the subjects. The law of nature stands as an eternal rule to all men,

legislators and others. The rules which they enact for others must be conformable to the law of nature. The fundamental law of nature is the preservation of mankind and no human sanction can be good or valid against it.

The legal theory of Locke gave theoretical form to the reaction against absolutism and to the preparation of parliamentary democracy. He put emphasis upon the inalienable rights of the emancipated individual. He had great influence on the American Revolution and the French Revolution. The combination of noble ideals and acquisitiveness, natural law philosophy and protection of vested interests in American history owes much to Locke.

*Rousseau.*—Rousseau (1712-88) gave his theory of social contract in his two books, namely, *The Social Contract* and *Emile*. According to him, the state of nature was an era of idyllic felicity. Reason did not guide the actions of individuals who were moved by their emotions. To quote Rousseau: "Man by nature never thinks and he who thinks is a corrupt creature." Every individual had unlimited liberty. There was no private property, no competition and no jealousy. Every individual lived the free life of a savage. He knew neither right nor wrong and was away from all notions of virtue and vice. There was innocence everywhere. However, this state of affairs did not last long. The increase in population and the dawn of reason were mainly responsible for the change. Simplicity and happiness disappeared. People started thinking in terms of mine and thine. The arts of agriculture and metallurgy were discovered and in the application of them man needed the help of others. Cooperation revealed and emphasized the diversity of man's talents and the inevitable result followed. The stronger man did the greater amount of work and the craftier got more of the product. Thus appeared the differences between the rich and the poor which was the prolific source of all other sources of inequality. Life became intolerable. There were wars and murders everywhere. The problem was "to find a form of association which protects with the whole common force the person and property of each associate, and in virtue of which everyone, while uniting himself to all, remains as before." The problem was solved through a social contract.

By a social contract, everyone surrendered to the community

all his rights and the result was that the community became sovereign. Even after the contract, the individual remained as free as he was before. To quote Rousseau: "Since each gives himself up to all, he gives himself up to no one; and as there is acquired over every associate the same right that is given up himself, there is gained the equivalent of what is lost, with greater power to prescribe what is left." Law is the expression of the general will. Sovereignty can never be alienated or represented or divided. The sovereign can be represented only by himself. The government is not the same thing as the sovereign. The government is not a party to the contract. The government was created in this manner. First of all a law was passed by the sovereign to the effect that there shall be a government and after that, the governors were appointed. Rousseau identifies sovereignty with the general will or the common interests of the community. His sovereignty is infallible, indivisible, unrepresentable and illimitable. It is unrepresentative because it lies in the general will which cannot be represented. The sovereignty of the State is absolute like that of Hobbes. The only difference is that while Hobbes assigns sovereignty to the head of the State or a monarch, Rousseau gives it to the whole community. In the case of Rousseau, the sovereign people cannot divest themselves of their sovereignty even if they wish, but Hobbes makes the people alienate for ever their sovereignty. Rousseau unites the absolute sovereignty of Hobbes and the popular consent of Locke into the philosophic doctrine of popularity. To Hobbes the sovereign and the government are identical but Rousseau makes a distinction between the two. He rules out a representative form of government. Even after giving absolute powers to the sovereign, Rousseau lays down that the sovereign must rule properly. It must not do anything which is not in the interest of the whole people. It must ensure equality of all before law and maintain a rule of justice. It "cannot impose upon its subjects the fetters that are useless to the community". Rousseau's view of sovereignty was a compromise between the constitutionalism of Locke and absolutism of Hobbes. According to Rousseau, sovereignty lies in the general will which cannot impose any limitations on itself. It can have no interest apart from those of the people and therefore there is no need for any limitations on it.

According to Rousseau, just as nature gives each man an absolute power over all his parts, likewise the social contract gives an absolute power to the body politic over all its parts. It is this power which is called sovereignty when it is directed by the general will. This absolutism is based not on fear or compulsion but on consent. The various powers such as legislative, executive etc. are only emanations of sovereignty which is one and unified and which collectively belongs to the people. Sovereignty is the source of all laws. Separation of powers is not the division of sovereignty but the exercise of it for the sake of convenience.

Rousseau maintains that the individual is free in the State because he does not surrender his rights to an outside authority but to the corporate body of which he himself is a member. Restrictions on the liberty of individuals are self-imposed. The rights of liberty, equality and property are rights of the citizen and not the natural and inherent rights of the individual. Liberty is civil liberty and not natural liberty. Men are equal by law and not by nature. In actual practice, man alienates only such of "his powers, goods and liberty as it is for the community to control but it must also be guaranteed that the sovereign is the sole judge of what is important." An individual is free while following his real will. He is also free while following the general will and obeying the laws which proceed from it because his real will is an organic part of the general will and is in agreement with it. The liberty of Rousseau is not licence. It is not the unrestricted conduct of an isolated and independent individual. It is the rational freedom of an individual who lives a common life with others and whose welfare is integrally related to the welfare of others.

According to Rousseau, law is the expression of the general will. "A law is a resolution of the whole people for the whole people, touching a matter that concerns all." The law must relate to general interest. Law represents the general will with general interest in view and never persons or actions. The enactments of the government are merely a corollary of the general will. Nobody in the State is above law as everybody is a member of the sovereign body which is the source of law. Laws representing the general will cannot be unjust because nobody is unjust to himself.



One is free when he is obeying laws because laws merely reflect his own will. Law re-establishes equality which belongs to man in the state of nature. A State is legitimate only when it is ruled by law. Laws are the sole motive power of the community "which acts and feels only through them". "The law considers the subjects collectively and their actions in the abstract; it never has for its object an individual man or particular action."

Rousseau put great emphasis on the General Will. According to him, in any society, we start with what he calls the will of all, i.e., the particular wills of the members of society. Everybody is allowed to will his own will and thus the majority will is found. When the majority will is found, those who did not vote with the majority must say to themselves that they did not will the general will and hence must will what the majority will is. It is in this way that the majority will becomes the general will by the minority willing as the majority had willed. The general will is the expression of the highest in every man. It is the spirit of citizenship taking concrete form and shape. General will is the manifestation of sovereignty. When sovereignty acts for the common interest, it is the exercise of the general will. So long as laws are in the common interest, they are the expression of the general will which is the key to self-expression.

General will cannot be self-contradictory. It is a reasonable will. It makes for unity in variety. The general will is permanent. It is not to be found "in the tempests of popular feeling, in the vagaries of statesmen. It is to be sought in the character of the people." The general will is always the right will. It always tends to the welfare of the whole. It is infallible. It can never be wrong. There can be no justification for disobeying it. Whenever an individual differs from the general will, he is in the wrong because his will is merely a selfish will and not the general will. There is no coercion even when a man is made to do something which is against his will. Since his real will is to be found in the general will which is manifested in the authority of the State, he is free even when he is being coerced by the general will. The understanding is that whoever refuses to obey the general will, shall be compelled to do so by the whole body. The general will is inalienable and indivisible. It cannot be represented in

any legislature. "As soon as the nation appoints representatives, it is no longer free, it no longer exists." The view of Rousseau was that Englishmen were free only during the election days and after that they were "enslaved and count for nothing". The general will cannot be delegated. The moment it is delegated, it loses its character. The moment there is a master, there is no longer sovereign. Rousseau stood for popular sovereignty.

The view of Rousseau was that the State should be a small one so that all the people may be able to assemble at one place and make laws. "The larger the State, the less the liberty."

Critics point out that Rousseau's doctrine of the general will is too abstract and narrow to be found in the practical world. The general will is neither general nor will. It can be determined only by a majority vote and not otherwise. The doctrine of general will may lead to State absolutism. In the name of the general will, the worse kind of tyranny may be practised. The doctrine of general will is based on the idea of common interests which are difficult to define. Even the worst of tyrants can justify their actions on the ground of common good.

Dr. Friedmann points out that the most immediate and far-reaching influence of Rousseau's doctrine was on the makers of the French Revolution who took up his theory of popular sovereignty to justify revolution without end or measure. His doctrines of liberty and equality, added to those of law, exercised a strong influence upon the formative era of American independence and the rights of man. Rousseau glorified the collective will as the embodiment of what is good and reasonable and this line of thought was developed by Fichte and Hegel to a dangerous climax. (*Legal Theory*, p. 77).

The social contract theories of the law of nature were both the causes and symptoms of profound changes in the European scene. They involved a separation of law from moral duty by their new emphasis on rights rather than on duties. They liberated the individual from the ties of feudalism and the Church. They prepared the ground for modern theories of government. They inspired the revolutions in the United States and France. They also eventually inspired totalitarian theories of government.

through Rousseau's doctrine of the general will. They spurred on the development of modern international law.

The doctrines of natural law and social contract were prominent in the legal philosophies of Kant (1724-1804) and Fichte (1762-1814). Both operated with certain fundamental rights of the individual which law must satisfy. Both used the construction of social contract as a hypothesis of reason and not a historical fact.

*Kant.*—Kant taught that in so far as man is a part of the world of reality, he is subject to its laws and to that extent is not free. However, his reason and inner consciousness make him a free moral agent. The ultimate aim of the individual should be a life of free will. It is when free will is exercised according to reason and uncontaminated by emotion that free-willing individuals can live together. People are morally free when they are able to obey or disobey a moral law.

An important feature of Kant's doctrine is his proclamation of the autonomy of reason and will. Human reason is law-creating and constitutes moral law. Freedom in law means freedom from arbitrary subjection to another. Law is the complex totality of conditions under which maximum freedom is possible for all. The sole function of the state is to ensure the observance of law. The individual should not allow himself to be made a means to an end as he is an end in himself. If need be, he should retire from society if his free will would involve him in wrongdoing. Kant saw the necessity of rules for social existence, guided by a just general policy. Society unregulated by right results in violence. Man has an obligation to enter into society and avoid doing wrong to others. Such a society has to be regulated by compulsory laws. If those laws are derived by pure reason from the whole idea of social union under law, man will be able to live in peace. What is needed is a rule of law and not of men. Kant's ideal of laws does not bear any relation to any actual system of law. It is purely an ideal to serve as a standard of comparison and not as a criterion of the validity of law.

Kant made a distinction between natural rights and acquired rights. He recognised only one natural right: the freedom of

man in so far as it can coexist with everyone else's freedom under a general law. Equality is implied in the principle of freedom. From this follow a number of rights pertaining to the individual, in particular the right to property as an expression of personality.

Kant considered political power as conditioned by the need of rendering each man's right effective, while limiting it at the same time through the legal right of others. Only the collective universal will armed with absolute power can give security to all. This transfer of power is based on social contract which is not a historical fact but an idea of reason. The social contract is so sacred that there is an absolute duty to obey the existing legislative power. Rebellion is never justified. A republican and representative State is the ideal State. Only the united will of all can institute legislation. Law is just only when it is at least possible that the whole population should agree to it. Kant was in favour of the separation of powers and was opposed to privileges of birth, an established church and autonomy of corporations. He was in favour of free speech. The function of the State was essentially that of protector and guardian of that law.

*Fichte.*—Fichte's Social Contract was divided into a property contract and a protection contract. Through property one became a citizen and hence everyone must have property so that he may not be excluded from the legal community. The right to punish was a part of the social contract and was based on retaliation. Fichte saw property as an emanation of personality.

### **Decline of Natural Law Theories**

The social contract theory did not survive the 18th century. One reason was that an individualistic conception of society put forward by the rationalism of the 18th century gave way to a collective conception stimulated by the rising tide of nationalism. Another reason was that the stupendous growth of natural science gave strength and emphasis to empirical methods against deductive methods. Still another reason was that the new and increasingly complex European society demanded a comparative and sociological approach to the problems of society and not an abstract one. It is maintained that Montesquieu (1689-1755) and Hume (1711-1776) destroyed the foundations of natural law. Although

Montesquieu superficially adhered to the doctrine of the law of nature, he maintained that law must be influenced by environment and conditions such as climate, soil, religion, custom, commerce etc. It was with this idea that Montesquieu embarked upon his comparative study of law and governments. His approach undermined the doctrine of natural law.

David Hume (1711-1776) destroyed the theoretical basis of natural law. The theory of natural law was based upon a conception of reason as a faculty inherent in all men which produced certain immutable norms of conduct. Hume showed that reason as understood in the systems of natural law was based on confusion.

According to Hume, values are not inherent in nature, nor is justice. Reason can only work out the means that will lead to specified results. Hume was in favour of the firm and inflexible application of rules although those should be widely designed and changed with the circumstances. On these lines, Hume attacked the prevailing conceptions of natural law. He challenged the conception of a perfect, complete and discoverable system. If there had been such a thing, there would not have been many divergent interpretations and the necessity of positive law.

At the dawn of the 19th century, there was a reaction against excessive individualism fostered by later natural law theories which resulted in the French Revolution. There grew up a collectivist outlook on life and natural law theories declined.

Objections to natural law theories also came from other quarters. The teachings of historians and sociologists put stress on environment. Historical investigations exploded many assumptions. Researches into the early history of society exposed the mythical nature of the social contract. The unit in early society was not the individual but the family or clan. The social contract theory had ascribed the validity of law to a contract but normally it was found to be the opposite. Some rule had to be presupposed which prescribed that agreements are to be kept. Even as a hypothesis to account for the present state of affairs, the social contract theory fell short. It only heaped fiction upon fiction. The alternative explanations of the origin of society not only fitted with the facts of today but were truer in themselves.

The *a priori* methods of natural law philosophers were not acceptable to those who were brought up in the pragmatic spirit of science. The postulates of natural law were subjected to critical examination and their bases were found to be false or the results of false inferences. It was found that there was no foundation for the sweeping assertion that man must always seek society or that man is always selfish. It is wild inference that because certain institutions are alike in different countries, they must reflect some universal law. It was contended that the whole idea of natural law was no more than a psychological reflex. The very diversity observable in the systems of positive law raises in the mind an antithesis of a fixed and changeless law. It became evident that the complex problems of the 19th century required a realistic and practical approach and not that of natural law which was based on abstract pre-conceptions. In the new climate of opinion, the prevailing natural law theories could not survive and their place was taken by analytical and historical positivism.

*Bentham.*—Bentham (1748-1832) regarded natural law as nothing but a phrase. He mercilessly criticised the idea of natural rights and described them as "simple nonsense; natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts." About the principle of equality, he wrote: "Absolute equality is absolutely impossible. Absolute liberty is directly repugnant in the existence of every kind of government... All men are born free? All men remain free? and not a single man... All men, to the contrary, are born in subjection." Bentham criticised Blackstone for basing political obligation upon an original social contract. His view was that there was no such thing as a social contract in the past and even if there was such a contract in the past, that could not bind the present generation.

*Austin.*—John Austin (1790-1859) rejected natural law on the ground that it was ambiguous and misleading. According to him, the science of jurisprudence is concerned with positive law by which he meant a science of laws. Austin was opposed to the concept of natural rights of individuals against the State. His view was that all rights were created and regulated by the State. The State did not originate in a social contract. The people did not obey the State on account of any formal consent but on

account of the force of their habit of obedience. The State continues to exist on account of its utility to the people.

Although the 19th century was hostile to natural law theories, the natural law tradition was continued on the continent, but with decreasing force and without essential new contributions by Ahrens, Krause and others. Lorimer restated the orthodox natural law theory as determining the ultimate objects of positive law and elaborated a catalogue of rights revealed by nature.

### Natural Law Ideas in English Law

It is true that utilitarianism and positivism had strong influence upon England in the 19th century and natural law thinking declined, but the ideas of natural law had their influence on English law. Chief Justice Coke vigorously asserted the supremacy of common law over Acts of Parliament. To quote him: "It appears in our books that in many cases the common law will control Acts of Parliament and sometimes judge them to be utterly void, for when an Act of Parliament is against common right or reason or repugnant or impossible to be performed, the common law will control it and adjudge such to be void."

The view of Prof. Holdworth is that from the 16th century onwards the supremacy of law and supremacy of Parliament had merged and were not challenged again. However, lip service continued to be paid to the idea of natural law. In his *Commentaries*, Blackstone wrote: "This law of nature being coeval with mankind and dictated by God himself is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to this; .... Upon these two foundations, the law of nature and the law of revelation, depend all human laws."

In some branches of modern English law, principles of natural justice are openly invoked to test the validity of legal acts but that does not apply to test the validity of any Act of Parliament as Parliament is supreme in England. The most important examples are the supervision of administrative acts and decisions by law courts, recognition of foreign judgements and custom. A custom is not admitted by courts if it is not reasonable. By means of an order of prohibition or *certiorari*, the High Court in England

can control administrative acts and quasi-judicial decisions of administrative bodies which are contrary to the rules of natural justice. A foreign law applicable or a foreign transaction recognised in a case before an English court is not enforced if certain principles of natural justice such as fair trial, freedom of person, freedom of action are disregarded by such application or recognition. In this sense, natural law ideas have exercised great formative influence upon English law in various phases of its development. The view of Maitland is that natural law ideas were of considerable importance in England. Natural law ideas have exercised the most profound and enduring influence upon English law as guiding principles in law making. The attempt of Lord Mansfield to introduce the doctrine of unjust enrichment in English law was an application of the principles of natural justice. "Reasonableness" in tort and elsewhere is the outcome of natural law ideas. The concept of quasi-contract in English law is based on natural law principles. The principles of "justice, equity and good conscience" are based on natural law ideas. While welcoming the American Bar Association to London in 1957, Lord Kilmuir, L. C. referred to "the doctrine which we share with a wider community even than that of the Common Law but which has for various reasons become a little dusty and old-fashioned in recent years and which I myself would like to see refurbished and restored to the position which it once used to occupy. I refer to the doctrine of *the law of nature, one of the noblest conceptions in the history of jurisprudence.*" Lord Morris also asserts a bigger role for natural law in modern English law.

### Natural Law in American Jurisprudence

The principles of natural law and natural rights have exercised great influence on the Constitution of the United States and also on the State Constitutions. Since the case of *Marbury v. Madison* in 1803, the Supreme Court of the United States has asserted its right to test the validity of any legislative or administrative act in the light of the Constitution. The Declaration of Independence refers to man's inalienable right of life, liberty and pursuit of happiness. These are also reflected in the constitutions of many American States. The principle of the limitation of legislative power by certain basic principles of justice is an appli-



cation of natural law. The Supreme Court has asserted the sanctity of vested rights against social legislation and extended the "indestructible right of the individual" to the corporation. According to Justice Story, a grant of title to land by the legislature is irrevocable upon the principles of natural law. Cooley refers to the principles of "inalienable rights", "due process" and "eminent domain" in American law. The power to impose taxes is restricted to "public purposes" and those are what the judges understand them to be. Eminent domain can be exercised only for public purposes and with adequate compensation. The "due process of law" was extended to protect unrestricted liberty of contract.

Rommen refers to the natural law thinking in the United States as a guarantee against ethical relativism and legal positivism. (*Natural Law*, p. 41).

Undoubtedly, natural law thinking inspired the fathers of the American Constitution and has dominated the American Supreme Court more than any other law court in the world. The American Constitution gives as near an approach to the unconditional embodiment of "natural" rights as can be imagined. Where the battle is fought in terms of fundamental rights embodied in the written Constitution, the natural law appeal will be direct and powerful.

### Revival of Natural Law Theories

Towards the end of the 19th century, there was a revival of natural law theories. That was due to many reasons. There was a reaction against the 19th century legal theories which had exaggerated the importance of positive law. It was realised that abstract thinking or *a priori* assumptions were not completely futile. The pure positivist approach failed to solve the problems created by the new social conditions. The material progress and its effect on society made the thinkers look for some values and standards. Western society was shattered by the first World War and there was a search for an ideal of justice. Science began to become doubtful about itself and the certainty of scientific facts. The youth rebelled against the self-satisfaction of the bourgeoisie, money worship and modern life. Social reformers and socialists

attacked inequalities in society. Lawyers began to feel that law was not simply a matter of applying statutes or precedent to any given case or situation by means of pure logic. The unsolved problems demanded a guide higher than positive law. As the faith of certainty wavered, idealistic philosophy revived. There was a search for the ideals of justice. The result was the revival of natural justice. The emergence of ideologies such as Fascism and Marxism caused the development of counter ideologies which contributed to the revival of natural law theories.

The new theories of natural law took into account the various approaches to law such as analytical, historical and sociological approaches. They also sought guidance from contemporary theories in other branches of knowledge. The revived natural law is relative and not abstract and unchangeable. The new approach of natural law is concerned with practical problems and not abstract ideas. It tries to harmonise natural law with the variability of human ideals. It takes into account new legal theories which put emphasis on society. To distinguish this approach to natural law from the old theories of natural law, the former has been called "natural law with a variable content."

One form which the revival of natural law has taken is the adaptation of the doctrines of St. Thomas Aquinas. Neo-Thomists, the followers of Aquinas, are prepared to accept the descriptions of reality provided by scientists but they maintain that it is for philosophy to give full explanation of reality through reason and reflection. They adopt the humanism of Aquinas to steer a course between an exclusively individualist view of man and a totalitarian view of society in which the individual counts for nothing. Natural law is both anterior and superior to positive law.

*Dabin.*—One of the principal representatives of this school is Jean Dabin. According to him, the law of nature was "deduced from the nature of man as it reveals itself in the basic inclinations of that nature under the control of reason". As human nature is identical in people everywhere, the precepts of natural law are universal in spite of historical, geographical, cultural and other such variations. One of the precepts of natural law is concerned with the good of society which is the purpose of State and law.

The State provides order and laws are means to that end. The State is superior to all other groups. State law "is the sole true law". Laws may be expressed variously in the form of statutes, precedents or customs but they are general regulations of conduct, not of conscience. Ordinarily they are obeyed and when they are not obeyed, compulsion under the authority of the State has to be employed. Laws are directed to conduct and not conscience. There is a moral duty to obey those positive laws which conform to the natural law principles of promoting the common weal. If a law fails to conform to that principle, it is not morally binding because "everybody admits that civil laws contrary to natural law are bad laws and even that they do not answer to the concept of a law". If they are not laws, there is no question of moral binding. In order to fulfil the common good, laws have to be adapted to the needs and ethos of the particular community. The actual making and applying of positive law with a view to giving effect to the dictates of natural law is an art which only jurists are competent to exercise. The rules of law do not simply put natural law into effect and in most cases a great many practical factors have to be taken into account. This shows an attempt to harmonise the restoration of natural law with the variability of human society and to follow the new emphasis on society.

*Stammler.*—Stammler (1856-1938) was an exponent of "natural law with a variable content". He first distinguished between technical legal science which concerns a given legal system and theoretical legal science which concerns rules giving effect to fundamental principles. The former deals with the content of law and the latter relates them to ultimate principles. In this way, Stammler distinguished between the concept of law and the idea of law or justice. He approached the concept of law in this manner. Order is appreciable through perception or will. Community or society is "the formal unity of all conceivable individual purposes and by this means the individual may realise his ultimate best interest. Law is necessary *a priori* because it is inevitably implied in the idea of cooperation". It just aims at harmonising individual purposes with that of society. Stammler sought to provide a formal, universally valid definition of law without reference to its content. He defined law as "a species

of will, others-regarding, self-authoritative and inviolable". Law is a species of will because it is concerned with orderings of conduct. It is others-regarding because it concerns a man's relations with other men. It is self-authoritative because it claims general obedience. It is inviolable on account of its claim to permanence. The idea of law is the application of the concept of law in the realisation of justice. Every rule is a means to an end. One must seek a universal method of making just laws. A just law is the highest expression of man's social activity. Its aim is the preservation of the freedom of the individual with the equal freedom of other individuals. In the realisation of justice, the specific content of a rule of positive law will vary from place to place and from age to age. It is for this reason that his theory has been given the name of "natural law with a variable content".

According to Stammler, in order to achieve justice, a legislature has to bear in mind two *principles of respect* and two *principles of participation*. The two principles of respect are that the content of a person's volition must not depend upon the arbitrary will of another. Every legal demand can only be maintained in such a way that the person obligated may remain a fellow creature. The two principles of participation are that a person lawfully obligated must not be arbitrarily excluded from the community. Every lawful power of decision may exclude the person affected by it from the community only to the extent that the person may remain a fellow creature. With the aid of these four principles, Stammler tried to solve the actual problems confronting law courts. He did not deny validity to the laws which fail to conform to the requirements of justice. His scheme is a framework for determining the relative justness of a rule or a law and for providing a means for bringing it nearer to justice.

The importance of Stammler's theory can be judged from the flood of controversy provoked by it. Before 1914, Stammler expressed the urge for scientific clarity and unity on one hand and a new idealism on the other. He put law scientifically on its own feet and revived legal idealism against the sterility of positivism. Both of these aspects have influenced modern legal theory. Until the rise of Fascism and National Socialism, the need for a true science of law was universally recognised. That does not mean that Stammler's particular concept of law as pure form

applied to changing economic matters, was scientifically unchallengeable. Neo-Kantianism has produced a very different philosophical appreciation of law as a cultural phenomenon.

Max Weber has given a detailed criticism of Stammler's concept of legal science. According to him, the alleged formal categories are in fact categories of progressive generalisation, the more general ones being relatively more formal than less general ones. Even if a purely formal concept of law can be imagined, it is incomprehensible how Stammler can maintain throughout his work the illusion that a purely formal idea of law is capable of material guidance to the lawyer. Philosophically, his fallacy is that he adopts the different parts of Kant's philosophy but destroys the basis of Kant's system.

Dr. Friedmann writes that Stammler was torn between his desire as a philosopher to establish a universal science of law and his desire as a teacher of civil law to help in the solution of actual cases. The result is an "Idea of Justice" which is a hybrid between a formal proposition and a definite social ideal, kept abstract and rather vague by the desire to remain formal. Stammler produces solutions dependent on very specific social and ethical valuations which it was his chief endeavour to keep out of an idea meant to be universal. (*Legal Theory*, p. 137).

*John Rawls.*—The view of Prof. John Rawls (1921) of the Harvard University is that society is a more or less self-sufficient association of persons who in their mutual relations recognise as binding certain rules of conduct specifying a system of cooperation. Principles of social justice are necessary for making a rational choice between various available alternative systems.

Prof. Rawls arrives at his theory in this manner. Fairness results from reasoned prudence. Principles of justice, dictated by prudence, are those which hypothetical rational persons would choose in a hypothetical "original position" of equality. The insistence on prudence excludes gamblers from participating in the "original position", but will bring in, on the whole, those who are conservatively inclined. People in the "original position" are assumed to know certain things, e.g., general psychology and the social sciences. This is designed to exclude personal self-interest when choosing the "basic principles of justice" so as to ensure their

generality and validity. What is needed is a form of justice which will benefit everyone, i.e., the disinterested individual's conception of the common good.

The Basic Principles of Justice are generalised means of securing generalised wants, "primary social goods" which include basic liberties, opportunity, power and a minimum of wealth.

The First Principle of Justice is: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." The basic liberties include equal liberty of thought and conscience, equal participation in political decision-making and the rule of law which safeguards the person and his self-respect.

The Second Principle is: "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." The "just savings principle" is designed to secure justice between generations and is described as follows: "Each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation."

With the aid of these principles, Prof Rawls tries to establish a just basic structure. There has to be a constitutional convention to settle a constitution and procedures that are most likely to lead to a just and effective order. After that comes legislation and its application to particular cases. Prof. Rawls claims that in this way the basic principles will yield a just arrangement of social and economic institutions.

The view of Prof. Rawls has been criticised on many grounds. One major attack launched by more than one critic is to question whether his conclusions follow from his "original position." It is maintained that the whole concept of "original position" and "veil of ignorance" and what it covers and what it does not cover only provide a semblance of justification for reaching certain desired conclusions.

Prof. Rawls gives certain "Principles of Priority". The First Priority Rule is the priority of liberty. "Liberty can be restricted only for the sake of liberty". A less extensive liberty must strengthen the total system of liberty shared by all. A less than equal liberty must be acceptable to those with the lesser liberty. The Second Priority Rule is the lexical priority of justice over efficiency and welfare. An inequality of opportunity must enhance the opportunity of those with the lesser opportunity. An excessive rate of savings must on balance mitigate the burden of those bearing this hardship. These principles ensure that as between liberty and need, liberty prevails. As between need and utility, need prevails. As between liberty and utility, liberty prevails. Liberty is to be given priority only after certain basic wants are satisfied.

As regards individuals, the view of Prof. Rawls is that reason yields principles of natural duties and fairness. The former include the duty to uphold just institutions, to help in establishing just arrangements, to render mutual aid and respect and not to injure or harm the innocent. The fairness principle gives rise to obligations, including promises. One should play one's part as specified by the rules of the institution as long as one accepts its benefits and provided the institution itself is just or at least nearly just. Civil disobedience is justified when "substantial injustice" occurs, all other methods of obtaining redress fail and disobedience inflicts no injury on the innocent. In these circumstances, disobedience is an appeal to the society's sense of justice which is evidenced by the reluctance of the community to deal with it.

Prof. Dias points out that Prof. Rawls has not succeeded in showing how his principles, desirable as they may be, derive from reason. The thrust of his theory is for stability. He puts emphasis on obedience grounded in fairplay. Law is only one institution of social justice. (*Jurisprudence*, p. 674).

*Morris*.—According to Prof. Clarence Morris (1893): "Justice is realised only through good law." Laws without just quality are doomed in the long run. Prof. Morris uses law in a broad sense. To quote him: "I use the word law to mean more than statutes and ordinances; it includes both adjudicated decisions of cases and social recognition of those legal obligations that exist without governmental promptings." (*Customs and Practices*).

Justice is one of the three principal justifications of law and the other two are rationality and "acculturation". The theory of Morris is concerned with the method of realising justice and is not a theory of just content. Law makers should serve the public by advancing its genuine aspirations which are "deep-seated, reasonable and non-exploitative." Law-making contrary to them is doomed to failure. Without public support, legislators cannot succeed.

Rationality, the second justification of law, is concerned with the reasoning processes of law, both judicial and legislative. Reason is a major ingredient of justice, but it is of a special kind. By becoming a judge, a judge incurs a duty to implement public aspirations within the judicial process. Although legislation must reflect them, that does not mean that an unjust law is not a law. A court is bound to apply it.

The third justification of law is "acculturation" which is in conformity with culture. The purport of a statute is more easily gathered when one is in tune with the cultural environment of the legislator. Under the heading of acculturation is included a plea for an awareness in law-making of man's responsibility towards his environment.

The general thesis of Morris is that law has to be justified morally, socially and technically. Morris does not specifically say that just quality is a necessary condition of the continuity of law but that seems to be implicit. The view of Prof. Dias is that perhaps Prof. Morris is not to be classed as either naturalist or positivist as his thesis would not be rejected by either side. (*Jurisprudence*, p. 676).

*Del Vecchio*.—Del Vecchio was a jurist of much greater elegance and universality than Stammler and his writings display a profusion of philosophical, historical and juristic learning. The larger part of his theory is grounded on Fichte and not on Kant. He conceives of natural law as nothing but merely a principle of legal evolution which guides mankind and law towards greater autonomy of man. It exists as a system of the highest truths, not sensible but rational. While psychological analysis reveals the foundation of an absolute law of justice or natural law in the human spirit, critical gnosiology endorses its validity.



Del Vecchio does not draw a line of demarcation between just and unjust and good and bad law. Law is neutral. Man has a double quality. He is, then and there, physical and metaphysical. Being a part of nature, he cannot distinguish between good and bad. Being an intelligent being, he possesses the possibility for free decision in himself. Man has in himself the "eternal seed of justice". This seed of justice is an idea and sentiment as well. As an idea, it emanates from the necessity of the individual to conceive himself as an ego. Individuality can only be conceived as a reciprocal notion in relation to another being. The essence of justice is in its inter-subjectivity. It is the simultaneous consideration of several subjects on an equal plane. Personality and law can only be conceived through the inter-relation of individuals.

For del Vecchio, justice has not only a formal but also a substantial meaning and an implicit faculty of valuation. Human consciousness postulates not only reciprocity in a formal sense but instinctively it also emits a definite valuation, a conception of justice which discriminates between various forms of juridicity.

For del Vecchio, justice has an ideal content which, stripped of all technicality, is the absolute value of personality or the equal freedom of all men. This ideal content is postulated by the inner conscience of man. It explains the ever-recurring quest for natural law. To del Vecchio, the evolution of mankind towards an increasing recognition of human autonomy appears to be the basis of natural law. Partial expression of this is given by the development from status to contract and from aggregation to association.

The view of del Vecchio is that positive law is a datum of experience and as such can be understood and explained as a phenomenon. It can be given a place coherently in the system of natural production.

There seems to be a definite break in the work of del Vecchio. The models for his earlier legal philosophy were Kant and the early Fichte, but in his later work it was definitely Hegel. This is clear from his theories on the relation between individual and

State, between reality and idea and the unfolding of an implied purpose of history.

Del Vecchio considered natural law as the principle of legal evolution which guides mankind and law towards greater autonomy of man.

*Geny.*—Francois Geny asserts the idea of natural law against the positivist theory of law. Natural law comprises a number of principles of reason, interpreted in accordance with the ideals of Western liberalism.

*Le Fur* —Le Fur considers the conception of natural law as necessary. It rests on human nature which, being that of a reasonable being, demonstrates to man that he is the creation of a superior will and intelligence.

*Hall* —The view of Prof Jerome Hall (1901) is that moral, social and formal considerations should be unified in a definition of positive law. According to him, time has come to reunite disciplines. Jurisprudence should be "adequate" in the sense that it will combine positivist, naturalist and sociological study. The result will be what he calls "integrative jurisprudence". The focal point of this is the action of officials and he calls the concept "law-as-action". Law-as-action from the point of view of officials relates to rules, values and social behaviour in the following way. Rules come in to explain official actions in prescribing, judging and ordering and applying sanctions. Values come into the idea of validity. The way in which validity is understood depends upon whether law is viewed as law-as-rules or law-as-action. Social behaviour comes in through the idea of effectiveness of law which covers a large range of phenomena including sanctions, conscious obedience and compliance. Laws are effective when actual behaviour in accordance with them maximises the values of their goals.

When looked at from the point of view of law-as-action, moral value must be included in any definition of positive law. According to Prof. Hall, customary law represents experience in settling problems in just and rational ways.

According to Hall, law possesses six features and those are ethical validity reflected in certain attitudes, functions, regular

character, range and character of public interest expressed in the laws of a State, effectiveness and supremacy.

According to Hall: "The objective validity of moral judgments is known intuitively or, as regards problematic situations, it is established by analysis, discussion and reflection, coherence with wider experience, the consensus of informed unbiased persons and the universality of solutions among diverse cultures". Hall does not believe that the correct answer to the most difficult ethical problems can be found by conscience, intuition or the law of God. Reason must aid in the choice between conflicting principles. Democracy is part of modern natural law because the values incorporated in democratic law "represent the most stable policy decisions which it is wise and feasible to implement by compulsion."

*John Wild* —The theory of John Wild (1902) proceeds on the idea that "there are norms grounded on the inescapable pattern of existence itself." His method of arriving at these is not that of logical deduction, but a different process, namely, "justification". He asks: "How is moral justification to be explained? We cannot explain it without recognizing that certain moral premises must somehow be based upon facts." The core of his thesis is that "value" and "existence" are closely intertwined. Existence has a tendency towards fulfilment or completion. If completion of existence is good, existence itself must be valuable. The same act is good so far as it is realised, but it is evil so far as it is frustrated. Goodness is some kind or mode of existence and evil is some mode of non-existence or privation.

According to Wild, the world is an order of divergent tendencies which, on the whole, support one another. Each individual entity is marked by an essential structure which it shares in common with other members of the species. This structure determines certain basic tendencies that are common to the species. If these tendencies are to be realised without distortion or frustration, they must follow a general dynamic pattern. This pattern is what is meant by natural law. It is grounded on real structure and is enforced by inexorable natural sanctions. Good and evil are existential categories. It is good for an entity to exist in a condition of active realisation. When all these principles are

applied to human nature, three ethical theses may be derived viz., the universality of moral or natural law, the existence of norms founded on nature and the good for man as the realisation of human nature. Natural law may be defined as "a universal pattern of action applied to all men everywhere, required by human nature itself for its completion."

*Fuller.*—Prof. Lon L. Fuller (1902) is regarded as the leading contemporary natural law lawyer. He does not contend that the rules of a legal system must conform to any substantive requirements of morality or any other external standard. He maintains the need for rules of law to comply with "internal morality." Initially, he draws a distinction between morality of duty and morality of aspiration. The former corresponds to an external morality of law. It consists in those fundamental rules without which society cannot exist. He sees law as a "purposive activity." The morality of aspiration exhorts mankind to strive for ideals and fulfil their potentialities in a Platonic way. He gives eight typical ideals or formal virtues to which a legal system should strive viz., generality, promulgation, absence of retroactive legislation and certainly no abuse of retrospective legislation, no contradictory rules, congruence between rules as announced and their actual administration, clarity, avoidance of frequent changes and the absence of laws requiring the impossible. These principles of legality are not basic conditions which every system necessarily fulfils, but constant pole stars guiding his progress. The greater its success, the more fully legal such a system is.

Fuller is critical of the assertion of Dworkin that while baldness is a matter of degree, a line can be drawn between law and non-law. To quote Fuller: "Law does not just fade away, but goes out with a bang."

Fuller does not develop the relationship between the form in which legal rules are expressed and their content. The Nazi legal system was faithful, with one possible exception, to the canons of Fuller and yet it was able to promulgate the Nuremberg racial laws which were utterly offensive to all human values. Fuller must surely believe that form has a direct bearing on content as otherwise his principles would be nothing more than the tools of an efficient craftsman.

The view of the critics of Fuller is that Fuller betrays confusion between efficacy and morality. Hart objects "to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification 'inner', as perpetrating a confusion between two notions that it is vital to hold apart the notions of purposive activity and morality".

Hart points out that the eight desiderata of Fuller are "unfortunately compatible with very great iniquity", e.g., Herod's order for the massacre of the innocents satisfied all the conditions. The reply of Fuller is to doubt whether an evil ruler could pursue iniquitous ends and also continue to respect "inner morality". He calls for "examples about which some meaningful discussion might turn" and which would show that "history does in fact afford significant examples of regimes that have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare". The contention of Fuller is that iniquitous regimes have not continued to exist, nor could they continue to combine evil policies with fidelity to "internal morality".

Castberg, a Norwegian jurist, refers to natural law in the sense of rules of ideal laws which are adapted to the oftchanging conditions of life.

D'Entrevies states that natural law contains the elementary principles which man must respect as long as they are what they are and propose to set up a viable society. He puts certain queries and asks. Are we to conclude that natural law is central and privileged sphere of morality distinguished by its sacred and inviolable character? Does it mean that outside the sphere of the minimum content, laws of any iniquity may stand? And even within it, what is the status of laws which flagrantly violate the minimum protection for which Hart's natural law stands? Are such laws laws and, if so, what, if any, is the right of resistance? To what extent can 'evil laws' permeate a system before that set-up becomes no more than a suicide club?

The most significant revival of natural law thinking in our time is to be found in contemporary German legal philosophy. This revival springs directly from the reaction against the excessive and, in the later phases of the Nazi regime, nihilistic manifestations of legal

positivism. German legal philosophers and law courts have sought to rethink and reformulate the relation of "higher law" principle and positive law. Deeply moved by the excesses of absolute State sovereignty perpetrated by the Nazi regime, Gustav Radbruch states that since law is, in its very nature, destined to serve justice, certain types of positive law cannot be defined as law and this applies to the whole portions of National Socialist Law. Radbruch was conscious of the extreme difficulty of separating "non-law" from merely "bad" or "unjust" law and the need to reserve the decision on those matters to institutions like the supreme constitutional court.

H. Krabbe, a Dutch jurist, strongly adheres to the "social conscience" or the "recognition" of law by those whom it applies. He admits no other authority as a true source of law. According to him, law is to the individual or groups of individuals in the same way as the theory of auto-limitation is to the State. This collective conscience becomes the corporate aspect of natural law. As for the individual judge or legislator who has to explore and expound the collective conscience, much stress is laid on his instinct or intuition, that is, his own moral sense and his own intelligence.

The view of Prof. C. K. Allen in *Law in the Making* is that reduced to its simplest language, the revived natural law appears to "mean little more than that the magistrate must judge as justly as he can, and the legislator must make laws as wisely as he can, in accordance with the prevailing ideas of justice and utility with which, it is to be hoped, (and, after all, it cannot be more than a hope), law-makers and law-dispensers of a particular community are imbued by training and experience." Again, "the new natural law does not seem to contain any very novel truth, or to be very felicitously named, and it probably would not have been so much canvassed on the continent had it not been associated with a movement for a moral, liberal and elastic judicial technique, *la libre recherche scientifique*, than has been orthodox in most European countries and also with controversies concerning the nature and limits of the powers of the State. Apart from these special problems, its chief value has been to counteract the tendency to exaggerate the purely historical and fortuitous circumstances of legal growth, at the expense of the moral principles

from which law may sometimes be judicially separated, but can never be divorced *a vinculo matrimonii*."

*Hart.*—Prof. H. L. A. Hart (1907) is in many ways the leader of contemporary positivism. In his book entitled *The Concept of Law*, Hart has attempted to restate the position of natural law from a semi-sociological point of view. He points out that there are certain substantive rules which are essential if human beings are to live continuously together in close proximity. To quote him: "These simple facts constitute a core of indisputable truth in the doctrines of natural law." Hart puts emphasis on an assumption of survival as a principal human goal. According to him, we are concerned with social arrangements for continued existence and not with those of a suicide club. There are certain rules which any social organisation must contain and it is these facts of human nature which afford a reason for postulating a "minimum content" of natural law.

Hart does not state the actual minimum universal rules but certain facts of "human condition" which must lead to the existence of some such rules but not necessarily rules with any specific content. According to Hart, those facts of human condition consist of human vulnerability, approximate equality, limited altruism, limited resources and limited understanding and strength of will. In the light of these inevitable features of human condition, there follows a "natural necessity" for certain minimum forms of protection for persons, property and promises. "It is in this form that we should reply to the positivist thesis 'law may have any content'."

Hart does not suggest that, even if this analysis of human society is accepted, this must inevitably lead to a system of even minimal justice within a given community. He accepts the fact that human societies at different periods of history have displayed a melancholy record of oppression and discrimination in the name of security and legal order as in the case of systems based on slavery, or systems based on positive religious or racial discrimination.

Hart's view of minimum content for natural law has been criticised. It is contended that this approach should not be

confused with an attempt to establish some kind of "higher law" in the sense of overriding or eternally just moral or legal principles, but is merely an attempt to establish a kind of sociological foundation for a minimum content for natural law. The justification for the use of the term natural law is that regard is paid to what is suggested to be the fundamental nature of man as indicated in the five facts of human condition by Hart. However, these "facts" are extremely vague and uncertain in most respects. They do not depend upon sociological investigation, but are really an intuitive appraisal of the character of the human condition. Lord Lloyd points out that it is difficult to see how any real minimum content whatever can be based upon such principles. The factor of human vulnerability restricts the use of violence but the need for human survival has not prevented the acceptance in many societies of the exposure of infants or the killing of slaves or children by those exerting power over them. A society may actually base its survival upon the need for human slaughter. The ancient civilisation of Mexico possessed a religious and a State system which required the perpetual propitiation of the gods by continuous human sacrifice on a massive scale. In relation to such a society, it seems difficult to talk in terms of individual human vulnerability as it might be conceived in a developed modern State which acknowledges as a fundamental principle the value of individual life and security.

Although Hart refers to the implications of approximate equality between human beings, he himself recognises that no universal system of natural law or justice can be based upon the principle of impartiality, or that of treating like cases alike. The rule of equality cannot be derived from any formal principle of impartiality. The idea of equality or non-discrimination is essentially a value judgment which cannot be derived from any assertions or speculations regarding the nature of man. No insistence on the idea of impartiality or the rules of natural justice, or the "inner morality" of the law in the sense used by Prof. Fuller, can afford a basis of arriving at such a principle as that of non-discrimination. This is fully recognised by Hart himself when he writes that the idea of impartiality is "unfortunately compatible with very great iniquity."

D'Entreves points out another gap in his treatment of natural



law by Hart. While Hart accepts the positivist view that the validity of a legal norm "does not depend in any way on its equity or iniquity", he maintains that natural law contains "the elementary principles which man must respect as long as men are what they are and propose to set up a viable society." D'Entrevès asks: "Are we to conclude that natural law is a central and privileged sphere of morality distinguished by its sacred and inviolable character?" Does this mean that outside the area of the minimum content laws of any iniquity may stand? and even within it, what is the status of laws which flagrantly violate the minimum protection for which Hart's natural law stands? Are such laws law and, if so, what, if any, is the right of resistance? To what extent can "evil laws" permeate a system before that set-up becomes no more than a suicide club?

Prof. Dias observes that it may seem ironic that this account of natural law should end with a leading positivist expounding on the "core of indisputable truth in the doctrines of natural law", but this may at least indicate that the gulf between the two groups is not as wide as it used to be. Positions are less clearcut now. It further underlines the point that classification into "naturalist" and "positivist" applies to views and not individuals. Certain doctrines may be labelled "naturalist" and others "positivist", but people may subscribe more or less strongly to one type or the other depending on the issue. (*Jurisprudence*, p. 684).

It is clear from what has been stated above that the concept of natural law has changed from time to time. It has been used to support almost any ideology—theocracy, absolutism and individualism. It has inspired revolutions and bloodshed. It has provided a firm ground for theorizing and expressing the ideas and thoughts of a particular age. It has influenced positive law and modified it. The theories of natural law have helped the development of law. A large number of principles of natural law have been embodied in the legal systems of various countries. Examples can be given from the legal systems of England, the United States and India. So far as England and the United States are concerned, a reference to them has already been made. As regards India, a number of legal principles and concepts have been borrowed from England and many of them are based on the

principles of natural law. The examples of some of them are "justice, equity and the good conscience", quasi-contract reasonableness in tort. The Constitution of India also embodies a number of principles of natural law. It guarantees certain fundamental rights to the people of India and gives the Supreme Court of India and the High Courts the power to exercise control over administrative and quasi-judicial tribunals and one of the grounds on which the orders are set aside, is the violation of the principles of natural justice. The principles of natural justice are incorporated in Article 311 of the Constitution which provides that no civil servant can be dismissed, removed or reduced in rank without giving him reasonable opportunity of showing cause against the action proposed to be taken against him.

In recent years, the ideas of natural justice have become more and more important and have been relied upon by the Supreme Court of India and High Courts in their decisions. In *A. K. Krupak v. Union of India*, the Supreme Court observed that the aim of the rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely, (i) no one shall be a judge in his own cause (*nemo debet esse iudex propria causa*) and (ii) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter, a third rule was added which provides that quasi-judicial inquiries must be held in good faith, without bias and not arbitrarily or unreasonably. In the course of years, many more subsidiary rules have been added to the rules of natural justice. Till recently, it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative inquiries. It is not easy to draw the line that demarcates administrative inquiries from quasi-judicial in-

quiries. Inquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial inquiries as well as administrative inquiries. An unjust decision in an administrative inquiry may have more far-reaching effect than a decision in a quasi-judicial inquiry. The rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened, the court has to decide whether the observance of that rule was necessary for a just decision of the facts of that case. In the case pending before the Supreme Court, the selections were set aside on the ground that they violated the principles of natural justice as one of the members of the Selection Board was himself interested in that selection. (AIR 1970 SC 150).

In *Maneka Gandhi v. Union of India*, the Supreme Court observed that natural justice is a great humanising principle intended to invest law with fairness and to secure justice. Over the years, it has grown into a widely pervasive rule affecting large areas of administrative action. The soul of natural justice is "fairplay in action" and it has received widest recognition throughout the democratic world. The Supreme Court held that even the procedure laid down by law must be right, just and fair. It is liable to be set aside on the ground that it is not reasonable. (AIR 1978 SC 597).

### SUGGESTED READINGS

- |                 |  |
|-----------------|--|
| Allen, C. K.    | : <i>Law in the Making</i> , 7th ed., Oxford, 1964.  |
| Bentham, J.     | • <i>The Theory of Legislation</i> , trans. R. Hildreth, ed. C. K. Ogden, Routledge & Kegan Paul Ltd., 1950. |
| Brunner, E      | • <i>Justice and the Social Order</i> , trans. M. Hottinger, Lutterworth Press, 1945.                        |
| Buckland, W. W. | <i>Some Reflections on Jurisprudence</i> , Cambridge University Press, 1945.                                 |
| Cohen, M. R.    | : <i>Reason and Nature</i> , Kegan Paul, Trench and Trubner & Co. Ltd., 1931.                                |

- Cowen, D. V. : *The Foundations of Freedom*, Cape Town, OUP, 1961.
- d'Entreve, A. P. : *Natural Law*, Hutchinson's University Library, 1951.
- del Vecchio, G. : *Philosophy of Law*, trans. T. O. Martin, Catholic University of America Press, 1953.
- Dewey, J. : *Philosophy and Civilisation*, G. P. Putnam's Sons, 1931.
- Dias, R. W. M. : *Jurisprudence*, Butterworths, London, 1976.
- Ellul, J. : *The Theological Foundation of Law*, trans. M. Wieser, S. C. M. Press Ltd., 1946, first British ed., 1961.
- Fitzgerald, P. J. : *Salmond on Jurisprudence*, Sweet and Maxwell, London, 1966.
- Friedmann, W. : *Legal Theory*, Stevens and Sons Ltd, London, 1960.
- Fuller, L. L. : *Law in Quest of Itself*, The Foundation Press Inc, 1940.
- Fuller, L. L. : *The Morality of Law*, revised ed, Yale University Press, 1969.
- Goodhart, A. L. : *English Law and the Moral Law*, Stevens & Sons Ltd., 1955.
- Haines, C. G. : *The Revival of Natural Law Concepts*, Harvard University, 1930.
- Hall, J. : *Foundations of Jurisprudence*, The Bobbs-Merrill Co Inc., 1973.
- Hall, J. : *Studies in Jurisprudence and Criminal Theory*, Oceana Publications Inc., 1958.
- Hart, H. L. A. : *The Concept of Law*, Oxford, Clarendon Press, 1961, reprinted, 1975.
- Holland, T. E. : *The Elements of Jurisprudence*, 13th ed, Oxford, 1924.
- Jolowich, H. G. : *Lectures on Jurisprudence*, ed J. A. Jolowicz, The Athlone Press, 1963.
- Jorgensen, S. : *Law and Society*, Akademisk Boghandel, 1972.
- Kelsen, H. : *What is Justice?* University of California Press, 1957.
- Laslett, P. (Edn.) : *Philosophy, Politics and Society*.
- Llewellyn, K. N. : *Jurisprudence. Realism in Theory and Practice*, The University of Chicago Press, 1962.
- Lloyd, D. : *The Idea of Law*, Penguin Books Ltd., A 688, 1964.
- Lord Lloyd : *Introduction to Jurisprudence*, Stevens & Sons, London, 1979.
- Maine, H. J. S. : *Ancient Law*, ed. F. Pollock, John Murray, 1906.
- Maritain, J. : *The Rights of Man and Natural Law*, Geoffrey Bles, The Centenary Press, 1944.
- Morris, C. : *The Justification of Law*.
- Paton, G. W. : *A Text Book of Jurisprudence*, 4th ed, G. W. Paton and D. P. Derham, Clarendon Press, Oxford, 1972.
- Patterson, E. W. : *Jurisprudence*, The Foundation Press Inc., 1953.
- Pound, R. : *Interpretations of Legal History*, Cambridge University Press, 1923.

- Pound, R. : *The Ideal Element in Law*, University of Calcutta, 1958.
- Pound, R. : *Jurisprudence*, West Publishing Co., 1959.
- Rawls, J. : *Theory of Justice*.
- Reuschlein, H. G. : *Jurisprudence—Its American Prophets*, The Bobbs-Merrill Co. Inc., 1951.
- Ritchie, D. G. : *Natural Rights*, Allen & Unwin Ltd., 1894.
- Rommen, H. A. : *The Natural Law*, trans. T. R. Hanley, B. Herder Book Co., 1947.
- Ross, A. : *On Law and Justice*, Stevens & Sons Ltd., 1958.
- Salmond, J. W. : *Jurisprudence*.
- Samek, R. S. : *The Legal Point of View*, Philosophical Library, New York, 1974.
- Seagle, W. : *The Quest for Law*, Alfred A. Knopf, 1941.
- Shklar, J. N. : *Legalism*, Harvard University Press, 1964.
- Silving, H. : *Sources of Law*, New York, 1968.
- Stammeler, R. : *Theory of Justice*.
- Stone, J. : *Human Law and Human Justice*, Stevens & Sons Ltd., 1965.
- Strauss, L. : *Natural Right and History*, University of Chicago Press, 1953.
- Wild, J. D. : *Plato's Modern Enemies and The Theory of Natural Justice*.
- Windolph, F. G. : *Leviathan and Natural Law*, Princeton University Press, 1951.
- Wright, B. F. : *American Interpretations of Natural Law*, Harvard University Press, 1931.
- Wu, J. C. H. : *Fountain of Justice, A Study in Natural Law*, Sheed & Ward, 1955.

# SUBJECT INDEX

- Abrogated decisions, 219-20
- Absolute liability, 423-25
- Administration of Justice, 128-68
- Administrative law, 45, 85-86
- Advantages and disadvantages of legal justice, 131-32
- Adverse possession, 368
- Agreement
  - as source of law, 280-81
  - importance of, 410-11
  - kinds of, 411-12
  - validity of, 412-13
- American Realism, 652-71
  - and Gray, 654
  - and Jerome Frank, 656-60
  - and Justice Holmes, 654-56
  - and Llewellyn, 660-65
  - assessment of, 660-70
- Analytical Legal Positivism, 503-42
- Analytical School, 505-40
- Animus Possidendi, 357-58
- Antecedent and remedial rights, 319
- Aquinas, 692-96
- Aristotle, 690-91
- Austin, 2-5, 514-26
  - and Bentham, 526-27
- Austin's theory of law, 31-33
  - criticism of, 33-41
- Austin's theory of sovereignty, 119-27
- Autonomic law, 89-90
- Bentham, 507-14
  - and Austin, 526-27
  - and Natural Law, 711
- Bracket theory of corporation, 394
- Burke, 559
- Capital punishment, 148-60
- Character of the offender, 452
- Chose in action, 476
- Chose in possession, 476
- Circumstantial evidence, 490-91
- Civil and criminal justice, 133-36
- Civil justice, 163-66
- Civil law, 76-77
- Civil liability, 416-17
  - measure of, 452-53
- Civil rights, 309-10
- Codification, 188-95
  - demerits of, 192-95
  - kinds of, 190
  - merits of, 190-92
- Common law, 77-79
- Composite state, 113-14
- Computer prediction in law, 665-66
- Comte and Sociological School, 607
- Concession theory of corporation, 393
- Conclusive proof, 492-93
- Condition precedent and condition subsequent, 344-46
- Constructive possession, 368
- Contingent interest, 342-44
- Contingent ownership, 342
- Contributory negligence, 450-51
- Conventional custom or usage, 264-66
- Conventional law, 69-70, 89
- Co-ownership, 347
- Corporal punishment, 161-62
- Corporate personality, theories of, 390-96
- Corporation
  - and firm, 389
  - and natural persons, 389-96
  - fiction theory of, 390-91
  - nationality of, 397-400
  - state as a, 400
- Corporation aggregate, 386-87
- Corporation sole, 337
- Corporeal and incorporeal ownership, 335
- Corporeal and incorporeal possession, 366-67
- Corpus of possession, 353
- Crime and tort, distinction between, 453-54

- Criminal law, 95-96
- Criminal liability, exemption from, 455-56
- Culpable negligence, 444
- Custom, 254-74  
     binding force of, 257-59  
     conventional, 264-66  
     definition of, 254-55  
     general, 268-69  
     kinds of, 264-69  
     legal, 264  
     local, 267-68  
     must be continuously observed, 271  
     must be reasonable, 270-71  
     origin of, 255-57  
     prescription and, 272-73  
     present position of, 273-74  
     requisites of a valid, 269-72  
     theories regarding transformation of, into law, 259-64  
     to be immemorial, 269-70
- Customary law, 70-71
- Damnum Sine Injuria*, 427
- Dead person, legal status of, 380-83
- Decision  
     on authority, 247  
     on principle, 247  
     reached *per incuriam*, 241-42  
     *sub silentio*, 242-43
- Declaratory precedent, 238
- Delegated legislation, 181-83  
     methods of control of, 182-83
- Delictal obligation, 481-82
- Deportation as punishment, 161
- Derivative possession, 367-68
- Deterrent theory of punishment, 136-38  
     and preventive theories, relation between, 138-39  
     and reformative theories, relation between, 143-45
- Dicey on sovereignty, 117
- Disregard of precedent, 247-48
- Doctrine of Prospective Overruling, 243
- Duguit and Sociological School, 609-16
- Duguit on sovereignty, 118
- Duplicate possession, 368
- Durkheim, 607-8
- Ehrlich, 635
- Equitable interpretation of legislation, 201
- Equitable rights, 318
- Equity, 79-80
- Equity of a statute, 204
- Estate and status, 307-8
- Fichte  
     and natural law, 709  
     and Philosophical School of Law, 593-94
- Fiction theory of corporation, 390-91
- Foreign law, 88-89
- Frank, Jerome, 656-60
- Fuller, I L., 725-26
- General Custom, 268-69
- Gray, 654
- Hagerstrom, 672-74
- Hagerstrom  
     and objective values, 673-74  
     empirical basis of rights, 673  
     historical basis of rights, 673
- Hart, H.L.A., 528-40, 728-30
- Hart and Natural Law, 728-30
- Hauriou, 616-18
- Hegel and Philosophical School of Law, 594-98
- Historical interpretation of legislation, 202-3
- Historical Jurisprudence and Legal Theory, distinction between, 585-86
- Historical School of Law, 557-87  
     and Analytical School, comparison of, 584-85  
     and Savigny, 560-71  
     estimate of, 583-84  
     nature of, 557-58
- Hobbes and natural law, 699-701
- Holland, 5-8
- Holmes, Justice, 654-56
- Hume, David, 710
- Idol, legal status of, 383
- Ihering, 619-35
- Immediate and mediate possession, 365-66

- Imperative law, 64-65
- Imprisonment as punishment, 162
- Incorporation, uses and purposes of, 401-3
- Injuria Sine Damnum*, 427-28
- Innominate obligations, 484
- Intention, 439-40
  - difference between motive and, 440-41
- Interest theory of rights, 290
- International law, 71-76
- Interpretation of legislation
  - golden rule of, 197-98
  - grammatical rule of, 195-97
  - historical, 202-3
  - logical rule of, 199-201
  - restrictive and extensive, 201-2
  - rule of *Casus Omissus*, 204-5
  - rules of, 195-205
  - sociological, 203-4
  - strict and equitable rule of, 201
  - The Mischief Rule of, 198-99
- Interpretation of statutes, rules of, 205-14
- Judge
  - and jury, 250-52
  - as law-makers, 227-30
  - do they make laws?, 224-32
- Judicial legislation
  - defects in, 232-33
  - methods of, 232
- Jurisprudence
  - and Economics, 20
  - and Ethics, 18-20
  - and History, 20
  - and Politics, 21
  - and Psychology, 18
  - and Sociology, 16-18
  - approach to study of, 12
  - Austin on, 2-5
  - Holland on, 5-8
  - Keeton on, 9-10
  - nature and scope of, 1-25
  - Pound on, 10-11
  - relation of, with other social sciences, 15-16
  - Salmond on, 8-9
  - scope of, 11-12
  - significance and utility of, 12-15
  - synthetic, 21-23
  - what is, 1-11
- Jus Ad Rem*, 321-22
- Jus Necessitatis*, 437-39
- Justice
  - according to law, 133
  - administration of, 128-68
  - advantages and disadvantages of legal, 131-32
  - civil and criminal, 133-36
  - importance of, 128
  - necessity of administration of, 129-30
  - origin and growth of administration of, 130-31
  - public, 132-33
- Kant and natural law, 708-9
- Kant and Philosophical School of Law, 591-93
- Keeton on Jurisprudence, 9-10
- Kelsen
  - and Basic Norm, 515-16
  - and Bentham, 555-56
  - and Pure Theory of Law, 543-45
  - contribution of, 554-55
  - on sovereignty, 118
- Law
  - administered by Prize Courts, 91-92
  - administrative, 85-86
  - Austin's theory of, 31-41
  - civil, 76-77
  - common, 77-79
  - constitutional, 80-85
  - conventional, 69-70
  - customary, 70-71
  - definition of, 26-31
  - disadvantages of, 55
  - discordance between law and fact, 59-60
  - general, 87-88
  - imperative, 64-65
  - international, 71-76
  - kinds of, 64-93
  - mixed question of, and fact, 59
  - natural or moral, 66-69
  - nature of, 26-63
  - physical or scientific, 65-66
  - practical or technical, 71
  - prize, 91-92
  - purpose and function of, 50-53
  - question of, 56-57
  - Salmond's definition of, 41-45
  - special, 87-92
  - territorial nature of, 47-50
  - transformation of question of fact into, 59
  - uses or advantages of, 53-55



Law Merchant, 266-67

Legal

- burdens, kinds of, 304-5
- custom, 264
- duty, 283-85
- enforcement of morals, 107
- equitable rights and, 317-18
- fiction, 61-63

Legal person, 384-85

- kinds of, 385-90

Legal presumptions, 60-61

Legal rights

- and duties, 282-323
- definition of, 285-89
- enforcement of, 293-94
- essentials of, 291-93
- extinction of, 294
- in a wider sense, 302-4
- kinds of, 310-22
- parties to, 293
- theories about, 289-91

Legal sanctions, 45-47

Legal status

- of idol, 383
- of lower animals, 378-80
- of mosque, 383-84
- of unborn persons, 382-83

Legal theory, 497-502

Legal wrong, 282-83

Legislation, 178-214

- advantages of, over Precedent, 185-86
- advantages of Precedent over, 187-88
- and Custom, 184-85
- and Precedents, 183-84
- as source of law, 178-79
- delegated, 181-83
- meaning of, 178
- methods of control of delegated, 182-83
- subordinate, 180-81
- supreme and subordinate, 179-83

Liability, 416-457

- absolute or strict, 423-25
- civil, 416-17
- definition and nature of, 416
- exemption from criminal, 455-56
- general conditions of, 425
- kinds of, 416-25
- measure of civil, 452-53
- penal, 418-19

Liability (*contd.*)

- remedial, 417-18
- vicarious, 420-23

Lien

- and mortgage, 465-66
- kinds of, 466

Llewellyn, 660-65

Local custom, 267-68

Local law, 88

Locke and Natural Law, 701-3

Logical interpretation of legislation, 199-201

Lower animals, legal status of, 378-80

Lundstedt, A.V., 681-84

Magnitude of the offence, 451-52

Maine, Sir Henry, 572-83

- contribution of, 581-82
- influence of, 582-83
- writings of, 573

Malice, 441

Martial law, 90-91

Marxist view of sovereignty, 118-19

Max Weber, 618-19

Measure of civil liability, 452-53

Measure of penal liability, 451-52

*Mens Rea*, 428-34

- when not essential, 431-34

Mercantile customs, 92

"Mischievous rule" in interpretation of legislation, 198-99

Mixed questions of law and fact, 59

Montesquieu, 606-7

Morals

- as part of law, 106-7
- influence of, on law, 107-8
- legal enforcement of, 107

Morals and law, 97-108

- relationship between, 103-6

Mortgage and lien, 465-66

Mosque, legal status of, 383-84

Motive of offence, 451

Municipal law and international law, 94-95

Municipal rights, 321

- Natural law, 688-734  
 and Aquinas, 692-96  
 and Kant and Fichte, 708-9  
 and Middle Ages, 692  
 and Rousseau, 703-7  
 and Social Contract Writers, 698-707  
 and Socrates, Plato and Aristotle, 689-91  
 and Supreme Court of India, 731-32  
 decline of theories regarding, 709-10  
 ideas in English law, 712-13  
 in American Jurisprudence, 713-14  
 in general, 688-89  
 or moral law, 66-69  
 revival of theories regarding, 714-30
- Natural person, 384
- Negligence, 441-43  
 and inadvertence, 443  
 and intention, 443  
 contributory, 450  
 objective theory of, 447  
 subjective theory of, 447  
 theories of, 446-51
- Neo-Hegelians, 598
- Obiter Dictum*, 245-47
- Obligation  
 arising from contracts or contractual obligation, 480  
 arising from *quasi* contracts, 482-83  
 arising from torts or *delictal* obligation, 481  
 definition of, 475-76  
 innominate, 484  
 law of, 475-84  
 solidary, 476-77  
 sources of, 480-84
- Olivecrona, 674-77  
 and binding force of law, 675-76  
 and rights, 676  
 estimate of, 676-77
- Ownership, 324-48  
 absolute and limited, 347-48  
 and Co-ownership, 347  
 Austin's view of, 325  
 corporeal and incorporeal, 335  
 criticism of the idea of ownership, 329-30
- Ownership (*contd.*)  
 definition of, 324-30  
 development of the idea of, 324  
 different kinds of, 331-36  
 essentials of, 330-32  
 Hibbert's view of, 327  
 Holland's view of, 327  
 legal and equitable, 339-40  
 Markby's view of, 327  
 modes of acquiring, 333-34, 413-14  
 of a right, 333  
 Paton's view of, 327-28  
 Pollock's view of, 328-29  
 right of, 333  
 Salmond's view of, 329  
 sole, 346  
 subject-matter of, 332-33  
 trust and beneficial, 335-36  
 vested and contingent, 340-42
- Penal and remedial proceedings, 164
- Penal liability, 418-19  
 measure of, 451-52
- Perfect and imperfect rights, 310-11
- Person, 377-406  
 definition of, 377-78  
 kinds of, 381  
 legal, 384-85  
 lower animals whether, 378-80  
 natural, 384  
 whether dead person a person, 380-83
- Personal  
 and real rights, 311-12  
 or real evidence, 490
- Philosophical School of Law, 580-604  
 and Kant, Fichte and Hegel, 591-93  
 and Kohler, Stammler and Del Vecchio, 599-603
- Physical or scientific law, 65-66
- Pluralists on sovereignty, 118
- Positive and negative rights, 311
- Positivism in law, 503-5
- Possession  
 adverse, 368  
 and ownership, distinction between, 373-75  
 concurrent, 367  
 constructive, 366  
 corporeal and incorporeal, 365-67  
 corpus of, 353

Possession (*contd.*)

- derivative, 367-68
- development of concept of, 351
- duplicate, 368
- elements of, 352
- immediate and mediate, 365-66
- importance of, 348-51
- in fact, 351
- in law, 352
- methods of transfer of, 363-64
- modes of acquiring, 413
- representative, 367
- Savigny's theory of, 358-63
- why it is protected?, 369-71

## Pound, Roscoe, 632-45

- and theory of social engineering, 634-43
- contributions, 644-45
- on Jurisprudence, 10-11
- on social justice, 643-44

## Precedent, 215-53

- absolute and conditional, 234-37
- and legal development, 248-50
- as source of law, 215-17
- authoritative and persuasive, 233-34
- authority of, 217-19
- circumstances which increase binding authority of, 224
- circumstances which weaken or destroy the binding force of, 219-24
- declaratory and original, 238
- disregard of, 247-48
- kinds of, 233-38
- nature of, 217
- sub silentio*, 222

## Preparation for crime, 436-37

## Prescription and custom, 272-73

## Presumption of innocence, 434-35

## Presumptive proof, 493

## Preventive theory and deterrent theory, relation between, 138-39

## Primary and secondary rights, 163-64, 319

## Primary functions of the state, 112-13

## Primary or secondary evidence, 490

## Principal and accessory rights, 316-17

## Private law, 96

## Prize law, 91-92

## Probative value of evidence, 492-94

## Procedural law, 485-86

## Procedure, law of, 485-94

## Professional opinions as source of law, 275-80

## Property

- and law, relation between, 474
- corporeal, 459-60
- historical theory of, 472-73
- incorporeal, 461
- kinds of, 459
- law of, 458-74
- meaning of, 458-59
- metaphysical theory of, 472
- natural law theory of, 471-72
- positive theory of, 473
- psychological theory of, 473
- real and personal, 460-61
- sociological theory of, 473-74
- theories of, 471-74

## Proprietary and personal rights, 314-15

## Public and private rights, 319-20

## Public justice, 132-33

## Public law, 95

## Punishment

- deterrent theory of, 136-38
- implications of, 546-50
- imprisonment, 162
- kinds of, 161
- preventive theory of, 138
- retributive theory of, 145-47
- solitary confinement, 162-63
- theories of, 136-48
- theory of compensation, 147

## Pure Theory of Law, 543-56

- criticism of, 550-54
- implications of, 546-50

## Purpose theory of corporation, 394

## Questions of fact, 57-58

- and discretion, 58-59
- and law mixed, 59
- transformed into law, 59

## Questions of law, 56-57

*Ratio Decidendi*, 244-45

## Rawls, 718-20

## Real and personal property, 460-61

## Realistic theory of person, 391-93

## Realists

- contribution of, 686
- in general, 685-86

- Reformative theory of punishment, 139-42
- Religion as sources of law, 280
- Remedial liability, 417-18
- Representative possession, 367
- Res Nullius*, 364-65
- Retributive theory of punishment, 145-47
- Rights  
     against state, 306-7  
     and duties of the state, 305-6  
     antecedent and remedial, 319  
     at rest and right in motion, 321  
     *in personam*, 314  
     *in re aliena*, 316, 462-63  
     *in re propria*, 315, 461  
     *in rem*, 313-14  
     inheritable and uninheritable, 315  
     kinds of legal, 310-22  
     legal and equitable, 317-18  
     municipal and international, 321  
     of beneficiary, 308-9  
     ordinary and fundamental, 321  
     perfect and imperfect, 310-11  
     positive and negative, 311  
     primary and secondary, 319  
     principal and accessory, 316-17  
     proprietary and personal, 314-15  
     public and private, 319-20  
     real and personal, 311-12  
     servient and dominant, 320  
     vested and contingent, 320
- Ross, Alf, 677-81
- Rousseau, 703-7
- Rule of *Casus Omnisus*, 204-5
- Rules of interpretation of legislation, 195-205
- Rules of interpretation of statutes, 205-14
- Salmond  
     on jurisprudence, 8-9  
     on sovereignty, 116-17
- Savigny, 560-71  
     contribution of, 570-71  
     criticism of, 563-70  
     theory of possession, 358-63
- Scandinavian and American Realists, 684-85
- Scandinavian Realism, 672-87
- Scandinavian Realists  
     and Hagerstrom, 672-74  
     and Lundstedt, 681-84  
     and Olivecrona, 674-77
- Secondary functions of courts of law, 165-66
- Securities, 465
- Servient and dominant rights, 320
- Servitudes, 463-64  
     kinds of, 464-65  
     personal, 464  
     positive, 464  
     public, 464
- Sociological interpretation of legislation, 203-4
- Sociological School  
     and Ehrlich, 625-32  
     and Ihering, 619-25  
     and Max Weber, 618-19  
     and Roscoe Pound, 632-45  
     evaluation of, 647-49
- Sociological School of Law, 605-51
- Sociological School of Law and Montesquieu, Auguste Comte, Durkheim, Herbert Spencer, Duguit, Gierke and Hauriou, 606-18
- Solidary obligations, 476-80
- Solitary confinement, 162-63
- Sources of law, 169-70  
     and sources of rights, 176  
     Austin's view of, 170-71  
     in England, 175-76  
     legal and historical, 171-74  
     material, 171-74  
     meaning of, 169-70  
     Salmond on, 171  
     Sociological view of, 171
- Sovereignty, 115-27  
     Austin's theory of, 119-27  
     Dicey on, 117  
     Duguit on, 118  
     Jethrow Brown on, 117-18  
     Kelsen on, 118  
     Marxist view of, 118-19  
     Pluralist view of, 118  
     Salmond on, 116-17
- Special laws, 88-92  
     Autonomic law, 89-90  
     Conventional law, 89  
     Foreign law, 88-89  
     Local law, 88  
     Martial law, 90-91

- Special Laws (*contd.*)  
     mercantile customs, 92  
     Prize law, 91-92
- Stammmler, 599-602, 716-18
- Stare Decisis*, 238-41
- State  
     and law, 114-15  
     and sovereignty, 109-29  
     composite, 114  
     definition of, 109-10  
     essential elements of, 110-11  
     functions of, 112-13  
     primary functions of, 112-13  
     secondary functions of, 113  
     unitary, 113
- Statute, ignorance of, 221
- Stone, 646-47
- Strict and equitable interpretation of legislation, 201
- Substantive law, 485-88
- Supreme and subordinate legislation, 179-93
- Synthetic Jurisprudence, 21-23
- Technical law, 71
- Territorial nature of law, 47-50
- Theories of punishment, 136-48  
     deterrent, 136-38  
     reformatory, 139-42
- Theory of compensation, 147-48
- Title, 407-15  
     classification of, 408-10  
     definition and nature of, 407-8
- Transferred malice, 434
- Trust, 466-67  
     agency and, 338  
     bailment and, 336  
     beneficial ownership and, 335-36  
     contract and, 337  
     executorship and, 336-37  
     mortgage and, 338-39
- Ultimate legal principles, 176-77
- Unborn person, legal status of, 382-83
- Unitary state, 113-14
- Vattel, 697-98
- Vecchio, Del, 721-23
- Vested and contingent ownership, 340-42
- Vicarious liability, 420-23
- Wild, John, 724-25
- Will theory of rights, 289-90

